SECTION F The Standard Inspection, Acceptance & Warranty Terms

Informal Lecture and View-graphs. (60 minutes)

INSPECTION & ACCEPTANCE

- Assumes acceptance based on seller assurances that items conform.
- Government reserves the right to inspect after tender for acceptance.
- Acceptance is not final in the case of defects.

Viewgraph F-1

- The standard inspection and acceptance language in FAR 52.212-4(a) assumes that the Government will accept items based on seller assurances that the commercial item tendered for acceptance conforms to the contract requirements.
 - The Government reserves the right to inspect deliverables that have been tendered for acceptance.
 - Unlike the inspection and acceptance language of non-commercial contracts, acceptance is not final in the case of defects. This is consistent with customary commercial practice when acceptance is based on seller assurances that supplies tendered conform to contract requirements.

This language may not be appropriate for complex commercial items or commercial items used in critical applications. In such cases, the contracting officer shall include alternative inspection procedure(s) in an addendum and ensure these procedures and the postaward remedies adequately protect the interests of the Government.

Performing In-Process Inspection

- a. Do not require offerors to submit to in-process inspection by the Government unless that is a customary market practice for the commercial item being acquired.
- b. Conduct such in-process inspections only in a manner consistent with commercial practice.

Viewgraph F-2

2. This is an area of significant change. The government is essentially out of the business of in-process quality assurance. No government inspection is allowed before the contractor tenders items for delivery unless in-process inspection is customary commercial practice for the item being acquired. Does that mean the government doesn't care about quality? Absolutely not. The government can still inspect – after the supplies are tendered for acceptance. The government can still reject nonconforming supplies – both before and after acceptance.

If it's customary commercial practice (i.e., if we're buying airplane generators and commercial firms that buy airplane generators typically perform in-process inspections during production of those generators), then our contract can allow us to conduct those same in-process inspections. But realistically, formal inspections of supplies are likely to become increasingly less commonplace under the new rules. Instead, we're going to rely on the integrity of our contractors to deliver acceptable products — yet retain contractual protections for those instances where we later find unacceptable ones.

Pre-Acceptance Steps

- 1. Seller must tender goods IAW contractual terms and conditions.
- 2. Delivered goods must meet "seller assurances" that goods conform to contractual requirements.
- 3. Buyer may accept or reject tendered goods.
- 4. Seller must cure improper tender.

3. FAR 12.208. Contract quality assurance. Contracts for commercial items shall rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance unless customary market practices for the commercial item being acquired include inprocess inspection. Any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice.

ACCEPTANCE DEFINED

- FAR acknowledgment that items conform to contract requirements
- UCC buyer, pursuant to a contract for sales, takes particular goods as buyer's own.

Viewgraph F-4

 FAR 46.501 states that acceptance is acknowledgment that the supplies or services conform with contract quality and quantity requirements in accordance with the terms and conditions of the contract.

The UCC at § 2-606 states that acceptance means that the buyer, pursuant to a contract for sales, takes particular goods as buyer's own. Buyer accepts by words, action, or silence. For example:

- After a reasonable opportunity to inspect, buyer says to seller,
 "The goods are nonconforming in the following respects and specifies defects. Despite such nonconformity we have elected to accept the shipment."; or
- Buyer fails to make an effective rejection after having had a reasonable opportunity to inspect the goods; or
- Buyer discovers goods are defective and attempts to reject.
 Notwithstanding this, buyer uses the goods. (Inconsistent action.)
- 5. Customary Commercial Acceptance Terms
 - Acceptance may take place before delivery, at the time of delivery, or after delivery —depending upon contract terms and conditions.

- b. Acceptance is effective upon total or partial delivery; completion of installation, completion of test and training, issuance of final payment plus 30 days, or all of the preceding.
- c. UCC provides the buyer the right *before* payment or acceptance to inspect goods at any reasonable place and time and in any reasonable manner. (FAR 52-212-4(a) allows government to inspect goods tendered for acceptance.)
- d. UCC provides post-acceptance rights (see Section 8 below).

Evidence of Acceptance SF 1449

Viewgraph F-6

6. Evidence of Acceptance. FAR 12.204 provides that Standard Form 1449, Solicitation/Contract/Order for Commercial Items may be used for documenting receipt, inspection and acceptance of commercial items.

EFFECT OF **A**CCEPTANCE

- Buyer must pay.
- Acceptance precludes rejection, but acceptance may be revoked.
- Buyer must notify seller of breach within a reasonable time.
- Burden on buyer to establish any breach after goods accepted.

Viewgraph F-7

- 7. Effect of Acceptance
- a. Buyer must pay at the contract rate for any goods accepted, although buyer may have remedies for nonconforming goods accepted. (UCC at § 2-607(1) and (2)).
- b. Acceptance of goods precludes rejection, although sometimes buyer may revoke acceptance (UCC at § 2-607(2). (This will be discussed further in Section M tomorrow).
- c. Where a tender has been accepted, buyer must within a reasonable time after buyer discovered or should have discovered any breach notify seller of breach or be barred from *any* remedy (UCC at § 2-607(3)(a)).
- d. The burden is on buyer to establish any breach with respect to the goods accepted (UCC at § 2-607(4)).

Post-Acceptance Rights

Government must exercise its post-acceptance rights –

- (1) Within a *reasonable time* after the defect was discovered or should have been discovered; and
- (2) Before any *substantial change* occurs in the condition of the item, unless the change is due to the defect in the item.

Viewgraph F-8

8. Post-Acceptance Rights

- FAR 52.212-4(a) states the Government must exercise its post-acceptance rights (1) within a *reasonable time* after the defect was discovered or should have been discovered; and (2) before any *substantial change* occurs in the condition of the item, unless the change is due to the defect in the item.
- FAR provisions are based on UCC § 2-608 (2).
- Some factors relevant in determining "reasonable time" are: difficulty of discovery of the defect; perishability of the goods.

Example of "Substantial Change" caused by defect:

A defective steering mechanism causes driver of car to lose control after having driven 14,680 miles. The car is a total loss. Substantial change in condition of the car was caused by the defect in the goods.

9. Other Issues

- a. Although FAR 12.402(a) does not address the issue of rejection, the Government always has the right to refuse acceptance of nonconforming items. (Discussed under Section D)
- b. FAR 12.402(b). Other acceptance procedures may be more appropriate for the acquisition of complex commercial items or commercial items used in critical applications. In such cases, the contracting officer shall include alternative inspection procedure(s) in an addendum and ensure these procedures and the postaward remedies adequately protect the interests of the Government. The contracting officer must carefully examine the terms and conditions of any express warranty with regard to the effect it may have on the Government's available postaward remedies (see 12.404).
- c. FAR 12.402(c). The acquisition of commercial items under other circumstances such as on an "as is" basis may also require acceptance procedures different from those contained in 52.212-4. The contracting officer should consider the effect the specific circumstances will have on the acceptance paragraph as well as other paragraphs of the clause.
- d. A FAR Part 12 contract differs from other Government contracts because under the inspection and acceptance language of the clause at 52.212-4, acceptance is not final in the case of patent defects. This is consistent with customary commercial practice when acceptance is based on seller assurances that supplies tendered conform to contract requirements.

STANDARD WARRANTIES

- "merchantability"
- "fitness for a particular purpose."

10. Standard Warranties

- a. FAR 52.212-4(o) includes the warranties of "merchantability" and "fitness for a particular purpose." These are two of the "implied warranties" in the Uniform Commercial Code (UCC).
 - (o) Warranty. The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.
- b. In some markets, it may be customary commercial practice for contractors to exclude or limit the implied warranties contained in FAR 52.212-4 in the provisions of an expressed warranty. In such cases, the contracting officer shall ensure that the express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance.
- c. FAR 52.212-4 does not incorporate other UCC implied warranties (e.g., the implied warranty arising from course of dealing, course of performance, or usage of trade) — but a contracting officer by tailoring can incorporate such warranties where consistent with commercial practice.
 - Example of implied warranty arising from course of dealing, course of performance, or usage of trade: The obligation to provide pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed dog. UCC § 2-314.
- d. The contracting officer may also agree to terms that disclaim implied warranties.

11. Implied warranty of merchantibility.

The UCC at §2A-212 provides that goods are merchantable only if the goods —

- a. <u>Pass without objection in the trade</u> under the description in the contract.
- b. Are fit for the ordinary purposes for which goods of that type are used.
- c. If fungible¹, are of fair average quality within the description.

¹ Note: "Fungible" means interchangable. In purchasing, fungible items are items that conform to industry standards and do not vary from producer to producer. Common building materials are good examples, such as drywall.

- d. Run, within the variation permitted by the contract, of even kind, quality, and quantity within each unit and among all units involved.
- e. Are adequately contained, packaged, and labeled as the contract may require.
- f. Conform to any promises or affirmations of fact made on the container or label.

Standard Commercial Practices

The UCC defines *implied warranty of merchantability* as a warranty that the goods shall be merchantable is implied in a contract for their sale, *if* the seller is a *merchant* with respect to goods of that kind (UCC at § 2-314(1), 2-104(1)). The principle warranty is that the goods be at least such as are fit for the *ordinary* purposes for which such goods are used (UCC at § 2-314(2)(c)).

Example: Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. Examples of nonmerchantable quality goods: shotgun shells that prematurely explode, shoes whose heels break off under normal use, cattle feed which contains sufficient nutrients to keep cattle alive but also causes sterility in bulls, cocktail robe that bursts into flames on casual contact with a stove burner, soft drink containing small particles of glass.

While there is no explicit requirement in § 2-314 that buyer rely on the warranty of merchantability, § 2-316(3)(b) states: "When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired, or has refused to examine the goods, there is no implied warranty with regard to defects which an examination ought to have revealed."

12. Implied warranty of fitness for a particular purpose.

The warranty of fitness for particular purpose applies when —

- a. The <u>seller knows the particular purpose</u> for which the Government intends to use the item; and
- b. The Government relied upon the contractor's skill and judgment that the item would be appropriate for that particular purpose. FAR 12.404(a)(2)

Standard Commercial Practices:

Where the seller at the time of contracting has reason to know: (1) any *particular* purpose for which the goods are required, and (2) that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose. The buyer must actually be relying on the seller. UCC at § 2-315.

A particular purpose differs from the "ordinary" purpose (the principal warranty of merchantability) for which the goods are used in that it envisions a specific use by the buyer which is peculiar to the nature of his business, whereas the ordinary purposes for which goods are used are those envisioned in the concept of merchantability (§ 2-314(2)(c)) and go to uses which are customarily made of the goods in question. Example: Shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for mountain climbing. Assuming that the seller has reason to know that the buyer is relying on seller's skill or judgment to select or furnish shoes fit for climbing mountains and that buyer does rely on seller's judgment, there is an implied warranty that the shoes shall be fit for mountain climbing (UCC at § 2-315).

A contract may include both a warranty of merchantability and one of fitness for a particular purpose. In fact the two warranties may often overlap. Shoes whose soles wear through in one week of ordinary use will not be fit for either a particular or an ordinary purpose.

CONTRACTOR DEFENSES

- Warranty specifically disclaimed in contract.
- Buyer agreed to sale "as is."
- Buyer examined the goods or sample.
- Buyer refused seller's demand that the buyer examine the goods.

Viewgraph F-13

13. Beware of Contractor Defenses to warranty actions.

The contractor has the following possible defenses under commercial law (UCC §2A-214) against a claim that a defect is covered by the implied warranty of merchantability:

- a. The warranty was specifically disclaimed in the contract, as tailored (e.g., by the terms of any express warranty incorporated as an addendum).
- b. The buyer agreed to a sale on an "as is" or "with all fault" basis.
- c. Before entering into the contract, the buyer examined the goods or a sample or model thereof as fully as desired, in which case there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed.
- d. Before entering into the contract, the buyer refused the seller's demand that the buyer examine the goods (or a sample or model thereof), in which case there is no implied warranty with regard to defects that an examination ought, in the circumstances, to have revealed.

14. Cumulation and Conflict of Warranties

An express warranty per § 2-313(1)(a) states: "This vehicle is warranted to be free of defects for 12,000 miles or twelve months, whichever occurs first."

Does this displace the implied warranty of merchantability?

Standard Commercial Rules: Warranties whether express or implied shall be construed as consistent with each other and as cumulative. If such construction is unreasonable, the intention of the parties shall determine which warranty is dominant. In ascertaining that intention, the UCC has rules designed to aid in determining the intention of the parties. For example: Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose. § 2-317

SECTION G Tailoring the Clause at FAR 52.212-4

Informal Lecture and View-graphs.

(60 minutes)

Learning Objective: Understanding of standard commercial terms and conditions that may be identified through market research and how to include them in a FAR Part 12 solicitation or contract.

DISTINGUISH BETWEEN SELLERS TERMS AND BUYERS TERMS

Organizations use two different "standards" — one set of terms is used when buying supplies or services, the other is used when selling.

Viewgraph G-1

- 1. Most commercial firms use two different sets of terms and conditions: one is used when the firm is the purchaser of goods, the other is used when the firm is the seller. Typically, buyer and seller terms different significantly even for the same firm. That's because the interests of the buyer and the seller in a transaction are significantly different, and the terms and conditions a firm uses are designed specifically to protect the firm's interests in the transaction. In the commercial sector, virtually all terms and conditions are negotiable, and most contracts are a negotiated compromise of buyer and seller terms that balance and protect both parties' interests.
 - a. Let's see if we can determine whether the following <u>Warranty</u> clauses represents the buyers interests, the sellers interests, or strike a balance between both interests.

SECTION 3. WARRANTY

ABC Company warrants that on the Installation Date the Equipment shall be in good working order, free from defects in material and workmanship and shall conform to ABC's published specifications for the Equipment current on the Installation Date. ABC's sole obligation under these warranties shall be to repair or replace, at ABC's option and expense, any defective or nonconforming components of the Equipment.

EXCEPT AS EXPRESSLY STATED HEREIN OR IN THE EQUIPMENT SCHEDULE, THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE OR OF MERCHANTABILITY.

- 9. WARRANTY: Seller expressly warrants that all goods or services covered by this order will conform to the specifications, drawings, samples, or descriptions furnished to or by Buyers, and will be merchantable, of good material and workmanship and free from defect. In addition, Seller acknowledges that Seller knows of Buyer's intended use and expressly warrants that all goods covered by this order which have been selected designed, manufactured, or assembled by Seller, based upon Buyer's stated use, will be fit and sufficient for the particular purposes intended by Buyer.
- 8. The Company warrants that the articles delivered hereunder shall be free from defects in material, workmanship and fabrication. This WARRANTY shall extend for a period of ninety (90) days after date of delivery of such articles to customer. THE COMPANY MAKES NO WARRANTY, EXPRESS, IMPLIED (INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTIBILITY AND FITNESS FOR INTENDED PURPOSE), OR STATUTORY, OTHER THAN THE FOREGOING EXPRESS WAR-RANTY. Failure of customer to submit any claim hereunder within ninety (90) days after receipt of such articles shall be an admission by customer and conclusive proof that such articles are in every respect as warranted and shall release the Company from any and all claims for damage or loss sustained by customer. In the event customer timely submits a claim for breach of WAR-RANTY, the parties agree that customer's sole exclusive remedy shall be the repair or replacement of such defective article or a refund of the price of the defective articles. In no event shall the Company be liable for incidental or consequential damages.

2. Limitation of Warranties. Unless an express written warranty is otherwise furnished by the Seller by a separate document, the Seller makes no warranty, express or implied, with respect to the goods sold and/or the services rendered by the Seller hereunder. ALL IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO THOSE OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE HEREBY DISCLAIMED AND EXCLUDED FROM THIS AGREEMENT, IN NO EVENT SHALL SELLER BE LIABLE FOR LOSS OF USE OR FOR ANY INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO CONSEQUENTIAL DAMAGES FOR PERSONAL INJURIES. In the event any component or part of the goods sold and/or services rendered hereunder have not been manufactured by the Seller, the Seller's sole obligation shall be limited to making available to Buyer any existing applicable warranty of the manufacturer of such component or part to the extent Seller can do so.

Answers: Seller/Buyer/Seller/Seller

b. Let's see if we can determine whether the following <u>Limitations of Liability</u> clauses represents the buyers interests, the sellers interests or strike a balance between both interests.

SECTION 9. HOLD HARMLESS

Purchaser shall indemnify and hold ABC Company harmless from and against any liability, loss, claim or damage to persons or property arising out of Purchaser's possession, operation or use of the Equipment except to the extent such liability, loss, claim or damage is caused by the fault or negligence of ABC Company.

SECTION 11. LIMITATION OF LIABILITY

- 11.1 ABC Company's entire liability to Purchaser for damages concerning performance or nonperformance by ABC Company or in any way related to the subject matter of this Agreement, regardless of whether the claim for such damages is based in contract or in tort, shall not exceed the amount of the Purchase Price for the Equipment that caused the damage or is the subject matter of or is directly related to the cause of action. This provision shall not limit the extent of the indemnity set forth in the section entitled "Patent and Copyright Indemnity", nor shall the limitation set forth herein apply to claims for personal injury or for damages to real or tangible personal property to the extent caused by ABC Company's fault or negligence.
- 11.2 In no event shall ABC Company be liable in any way for any indirect, special or consequential damages, including, but not limited to, lost business or lost profits, whether foreseeable or not, even if ABC Company has been advised of the possibility of such damages.

11.3 Notwithstanding anything else in this Agreement to the contrary, no default, delay or failure to perform on the part of ABC Company shall be chargeable hereunder if such is due to causes beyond ABC Company's reasonable control. In the event of any such default, delay or failure to perform, any dates or times by which ABC Company is otherwise scheduled to perform shall be extended automatically for a period of time equal in duration to the additional time required to perform.

Article 13. Limitation of Buyer's Remedies and Damages

- (A) IN NO EVENT SHALL SELLER BE LIABLE TO BUYER OR TO ANY PARTY CLAIMING UNDER BUYER WHETHER AS A RESULT OF BREACH OF CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE OR OTHERWISE), FAILURE OR A REMEDY TO ACCOMPLISH ITS PURPOSE OR OTHERWISE, FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES INCLUDING BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUE, LOSS OF USE OF THE PRODUCT, DAMAGE TO ASSOCIATED EQUIPMENT, DOWNTIME OF PLANT OR EQUIPMENT, COST OF SUBSTITUTE EQUIPMENT OR PRODUCTS OR CLAIMS OR BUYER'S CUSTOMERS FOR SUCH DAMAGES.
- (B) The liability of Seller on any claim of any kind, whether based upon breach of contract, warranty, tort (including negligence or otherwise), for any loss or damage arising out of, or resulting from this agreement, or from its performance or breach, or from any product furnished hereunder, shall in no event exceed the price of the product which gives rise to the claim. Except as to title, all such liability shall terminate upon the expiration of the applicable warranty period set forth in Article 9 above.
- 3. LIMITATIONS OF LIABILITIES. ABC COMPANY LIABILITY ON ANY CLAIM OF ANY KIND, INCLUDING NEGLIGENCE, FOR ANY LOSS OR DAMAGE ARISING FROM, CONNECTED WITH, OR RESULTING FROM THIS CONTRACT (OR QUOTATION), OR FROM THE PERFORMANCE OR BREACH THEREOF, OR FROM THE DESIGN, MANUFACTURE, SALE, DELIVERY, INSTALLATION, INSPECTION, OPERATION OR USE OF ANY EQUIPMENT COVERED BY OR FURNISHED UNDER THIS CONTRACT, SHALL IN NO CASE EXCEED A REFUND OF THE ORIGINAL PURCHASE PRICE OF THE UNIT (OR EQUIPMENT) WHICH GIVES RISE TO THE CLAIM. IN NO EVENT, WHETHER AS A RESULT OF BREACH OF CONTRACT OR WARRANTY OR ALLEGED NEGLIGENCE, SHALL ABC COMPANY BE LIABLE FOR LOSS OF USE OR FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY NATURE WHATSOEVER.

Answer: Seller/Seller/Seller/Seller

c. Let's see if we can determine whether the following <u>Patent Indemnity</u> clauses represents the buyers interests, the sellers interests or strike a balance between both interests.

SECTION 10. PATENT AND COPYRIGHT INDEMNITY

10.1 ABC Company shall, at its expense, defend Purchaser against all claims asserted by any person that the Equipment infringes a United States patent or copyright and shall, without limitation, pay the costs, damages and attorney's fees awarded against Purchaser in any such action, or pay any settlement or such action or claim, provided that ABC Company shall have the exclusive right to control and conduct the defense and settlement of all such actions or claims. Each party agrees to notify the other promptly of any matters to which the foregoing indemnity may apply. Purchaser agrees to do all acts, at ABC Company's expense, that may be reasonably required by ABC Company in connection with such defense or settlement.

10.2 If a preliminary or final judgment shall be obtained against Purchaser's use or operation of the Equipment or any part thereof by reason of any alleged infringement, or if, in ABC Company's opinion, the Equipment is likely to become subject to a claim for infringement, ABC Company shall, at its expense and option, either (a) modify the Equipment so that it becomes noninfringing; or (b) procure for Purchaser the right to continue to use the Equipment; or (c) substitute for the infringing Equipment other equipment having a capability equivalent to the Equipment. In the event the foregoing options are not reasonably available, upon ABC Company's written request Purchaser agrees to return the Equipment to ABC Company's expense, and ABC Company shall take back such Equipment and refund any sums Purchaser has paid ABC Company for the Equipment under this Agreement less a reasonable amount for use, damage and obsolescence. ABC Company shall have no liability for any claim based upon the combination, operation, or use of the Equipment with any equipment, device, or alteration to the Equipment not made by ABC Company. The foregoing states the entire liability of ABC Company for patent and copyright infringement.

- 14. INTELLECTUAL PROPERTY: Seller agrees: (a) to defend, hold harmless and indemnify Buyer, its successors and customers against all claims, demands, losses, suits, damages, liability and expenses (including reasonable attorney fees) arising out of any suit, claim or action for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark, copyright or mask work right by reason of the manufacture, use or sale of the goods or services ordered, including infringement arising out of compliance with specifications furnished by Buyer, or for actual or alleged misuse or misappropriation of a trade secret resulting directly or indirectly from Seller's actions; (b) to waive any claim against Buyer under the Uniform Commercial Code or otherwise, including any hold harmless or similar claim, in any way related to a claim asserted against Seller or Buyer for patent, trademark, copyright or mask work right infringement or the like, including claims arising out of compliance with specifications furnished by Buyer; and (c) to grant to Buyer a worldwide, nonexclusive, royalty-free, irrevocable license to repair and have repaired, to reconstruct and have reconstructed the goods ordered hereunder. Seller assigns to Buyer all right, title and interest in and to all trademarks, copyrights and mask work rights in any material created for Buyer under this order.
- 7. THERE IS NO WARRANTY BY THE COMPANY THAT THE GOODS SHALL BE DELIVERED free from any claim of any third person by way of infringement. There is no undertaking by the Company with respect to patent or trade-mark infringement.

Answer: Seller/Buyer/Seller/

Here's an interesting clause from a commercial contract, one that you've heard often is not a commercial practice. See if you can guess if this is from a buyer's terms or the seller's terms.

5. CHANGES: Buyer may at any time by written change order, make changes in the drawings, designs, and/or specifications applicable to the Tooling covered by this purchase order. If any such changes affect the time for performance or the cost of manufacturing such Tooling. Buyer shall make an equitable adjustment in purchase price or the completion date, or both.

GENERAL TAILORING TECHNIQUES

- Based on Market Research
- Tailor by Addenda
- Check for inconsistent or conflicting language elsewhere

Viewgraph G-2

2. The provision at FAR 52.212-1, Instructions to Offerors—Commercial Items, and the clause at FAR 52.21-4, Contract Terms and Conditions—Commercial Items, are intended to address customary commercial market practices for a wide range of potential Government acquisitions of commercial items. However, they are also intended to be tailored to the circumstances of the specific acquisition. No set of standard terms and conditions can be applied across the broad range of commercial items acquired by the Government. Contracting officers may, and are expected to, tailor both the provision at 52.212-1, Instructions to Offerors—Commercial Items, and the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, to adapt to the market conditions for each acquisition. (See FAR 12.213)

When tailoring, remember these three basic rules:

- Tailoring must be based on Market Research.
- Tailoring is done by addendum to the SF1449.
- Always check for language elsewhere in the standard terms and conditions that is inconsistent or conflicting with the addendum.

STATUTORY SECTIONS OF FAR 52.212-4 CANNOT BE TAILORED

- Assignments,
- Disputes,
- Payment,
- Invoice,
- Other compliances, and
- Compliance with laws unique to government contracts

Viewgraph G-3

- 3. Some sections of FAR 52.212-4 implement statutory requirements and may not be tailored by the contracting officer. These sections are detailed in FAR 12.302. In addition, the "Order of Precedence" section of the clause provides that the statutory sections of the clause take precedence over any addenda, making it impossible to tailor these sections.
- 4a. When tailoring to include a standard commercial practice not covered in the standard terms and conditions at FAR 52.212-4, be certain to apply the three basic rules.
 - Based on Market Research.
 - Use an addendum.
 - Check for inconsistent or conflicting language elsewhere.

We could call this simple tailoring. There is a lower probability that a practice not covered in the standard terms and conditions at all would be inconsistent with the standard terms. However, be certain to check anyway.

A good example of tailoring to include a standard commercial practice not covered in the standard terms and conditions at FAR 52.212-4 is a commercial computer software license, which is specifically discussed in FAR 12.212.

4b. When tailoring to overcome a standard term or condition that appears in the clause at 52.212-4, (or in the provision at 52.212-1), follow **the three basic rules we've emphasized, plus one**

additional rule. That is, overcome the standard provision in its entirety. Don't take the chance of creating confusion or making a mistake to "line in/line out" or "add/delete" in the addendum. Clearly state at the top of the addendum the contract number and "Addendum to FAR 52.212-4, Standard Terms and Conditions—Commercial Items." Follow this by identifying the specific term being overcome and language such as "This paragraph overcomes and has precedence over the "______" section of the clause at FAR 52.212-4, in its entirety."

TAILORING TO INCLUDE UNIQUE INSPECTION REQUIREMENTS

Market research indicates that a higher level of inspection prior to acceptance is the commercial norm.

Viewgraph G-5a

5a. Let's look for a minute at tailoring to include unique inspection requirements. Perhaps the item we're acquiring has a critical application and market research indicates that a higher level of inspection prior to acceptance is the commercial norm. First, let's look at the inspection/acceptance and warranty terms included in the standard terms and conditions.

Inspection/Acceptance

The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The Government must exercise its post-acceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

What we are looking at are the sections of the standard terms and conditions that cover inspection/acceptance. The principles contained in this section and the warranty section are based on the Uniform Commercial Code. They are also based on the policies

and principles enumerated in FAR Parts 10, 11, and a solicitation drafted under FAR Part 12. It may be helpful for procurement personnel to think of inspection/acceptance and warranty as a single concept. Although the Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance, the government relies on the seller's assurance that the items or services tendered conform to contract requirements. Under the Uniform Commercial Code, when the buyer relies on the seller's assurance of conformance, the buyer is entitled to repair or replacement of nonconforming supplies or reperformance of nonconforming services. However, the buyer (the Government) must exercise its post-acceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

Before we take a look at the warranty provisions in the standard terms and conditions, let's pause to look at the concept of a reasonable time in which the defect should have been discovered. I think we can quickly see that when the defect should have been discovered would differ depending on whether we completely relied on the seller's assurance that the item conformed to contract requirements, that is, we didn't open even open the box, or whether we performed some type of pre-acceptance inspection or testing. There is a logic here that does not differ from standard FAR practice for government-unique items. We're now at the other end of the inspection/acceptance/warranty continuum. For government-unique items, the government generally controls the process through specifications and standards and often is in the plant performing some type of in-process inspection - either of the items themselves or the process being used to produce them. Logically, the reasonable time in which the defect should have been discovered is when we were in the plant during production, or performing extensive pre-acceptance testing. It follows that the government-unique items, under standard FAR terms and conditions, come with virtually no warranty in the event defects are found after acceptance. The fact is, that by not relying on the seller's assurances we are assuming responsibility for discovering any defects.

FAR Part 12 is at the other end of the continuum. Under FAR Part 12 we rely fully on the seller's designs, processes and quality practices. We accept based on the seller's assurance that the item

conforms. It follows under these circumstances that the seller accepts full responsibility for the quality of the items - giving the buyer postacceptance rights in the event a defect is discovered.

Tailoring the Government's Postacceptance Rights to Reflect Increased Government Inspection Requirements

The acquisition of complex commercial items or commercial items used in critical applications may dictate pre-acceptance testing and inspection procedures.

Viewgraph G-5b

- 5b. There are three limitations on government contract quality assurance—
 - 1. Contracts for commercial items shall rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance.
 - 2. The only exception is when customary market practices for the commercial item being acquired includes in-process inspection.
 - 3. If the exception applies, any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice.

These limitations are fairly clear. Quite simply, Part 12 contracts cannot include inspection or testing prior to tender for acceptance unless market research determines that it is the customary market practices for the commercial item being acquired. In such cases, any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice.

If market research establishes that inspection or testing is performed prior to tender for acceptance, than it is certainly reasonable and prudent for the government to apply those same standards and practices to its contract for the same item. When market research indicates such practices, acquisition personnel should be particularly careful to ensure that the market research report clearly identifies the inspection, acceptance and warranty terms

customarily used in the marketplace. These terms should be used as a guide in crafting an addendum that includes the level of inspection found in the market and tailors the acceptance and warranty terms accordingly.

Such procedures must be included in an addendum and, again, the contracting officer must ensure that the postacceptance remedies in the contract adequately protect the interests of the Government. The contracting officer must carefully consider including an express warranty and thoroughly examine the terms and conditions of any express warranty with regard to the effect it may have on the Government's available post-acceptance remedies.

Tailoring to include a standard commercial warranty

Viewgraph G-5c

5c. To the maximum extent practicable, solicitations for commercial items shall require offerors to offer the Government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice. Solicitations may specify minimum warranty terms, such as minimum duration, appropriate for the Government's intended use of the item.

Warranties offered in customary commercial practice are called express warranties. Express warranties tend to limit and define the open-ended terms of implied warranties. Generally, they will define a specific time period in which the seller agrees to correct defective items. They also tend to limit the remedies the buyer can expect. For example they may limit the buyer to repair of defective items rather than replacement. Contracting officers should be careful to ensure that any express warranties adequately protect the government's interests in an acquisition.

Using FAR Provisions and Clauses Not Prescribed in Part 12

Include by addendum when consistent with customary commercial practice. Require a FAR waiver when inconsistent with customary commercial practice.

Viewgraph G-6

- 6. FAR clauses that may be consistent with customary commercial practice. Examples of are found in FAR 12.302.
 - (1) The clauses prescribed in FAR 16.505 may be used when an indefinite-delivery type of contract will be used.
 - (2) Appropriate FAR Part 17 provisions and clauses may be included when the use of options is in the Government's interest.
 - (3) The provisions and clauses contained in Part 23 regarding the use of recovered material may be appropriate.

As a general suggestion, when customary commercial practice indicates that a particular matter should be the subject of a provision or clause, compare existing FAR system provisions and clauses to ascertain differences between those and the commercial practices. Don't pile up the contract with unnecessary provisions and clauses, but don't be afraid to use those that you deem appropriate for your acquisition.

FAR Waivers — Tailoring to Include A Noncommercial Term or Condition

The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved.

- 7. Tailoring inconsistent with customary commercial practice is strongly discouraged and requires a FAR waiver. The request for a waiver must—
 - 1. Describe the customary commercial practice found in the market place;
 - 2. Support the need to include a term or condition that is inconsistent with that practice; and,
 - 3. Include a determination that use of the customary commercial practice is inconsistent with the needs of the government.

If a waiver is approved, the noncommercial term or condition should be included in an addendum just as any or term or condition is included in an addendum.

SECTION H Determining the Method of Procurement

Informal Lecture and View-graphs

(15 minutes)

Learning Objective: Knowledge of the appropriate uses of the procedures in FAR Parts 13, 14 and 15 for commercial items acquisitions.

The relationship of FAR Part 12 to Parts 13, 14 and 15

Viewgraph H-1

1. Let's review FAR 12.203.

12.203 Procedures for solicitation, evaluation, and award.

Contracting officers shall use the policies unique to the acquisition of commercial items prescribed in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate for the particular acquisition.

Use of Simplified Procedures for Commercial Items

- Purchases above micro-purchase threshold
- FARA establishes simplified procedures for commercial items up to \$5 million
- FACNET considerations

Viewgraph H-2

2. The simplified acquisition procedures in FAR Part 13 will generally be appropriate for commercial item acquisitions below the simplified acquisition threshold. As some of you know, Section 4202 of the Federal Acquisition Reform Act of 1995 permits the purchases of commercial items up to \$5 million using simplified acquisition procedures. However, this authority contained several limitations which have not yet been implemented into the FAR. So for now the increased authority is not available.

Just a quick note about using FACNET, FAR Part 12 still applies for the acquisition of commercial items using FACNET.

Considerations in Selecting Sealed Bidding for Commercial Items

- Fungibles
- Brand-name items
- Spare and replacement parts

Viewgraph H-3

3. The viewgraph lists some indicators of when the use of sealed bidding may be appropriate for commercial items. The FASA implementation team seriously considered eliminating or restricting the use of sealed bidding for commercial items. However, this formal practice does have appropriate applications, some of which are listed in the view-graph.

BEST VALUE PROCUREMENTS OF COMMERCIAL ITEMS

- a. Provides selection from multiple items that compete on value in the marketplace.
- b. Provides for consideration of offeror terms, conditions, and solutions.

Viewgraph H-4

4. If you think about it, we make best-value decisions every day in our personal lives when determining which of the competitive products in the commercial marketplace best meet our personal needs. Think about VCRs. There are hundreds on the market, priced from about \$89 up to \$1289. Each one of these products is competing in the marketplace. If they were not competitive, they would not be there. The technique of selecting the product that best meets the need and offers the best value is the most common acquisition technique used for commercial items. Although many people equate the acquisition of commercial items

with simplification and streamlining, this is not the case. The easiest procurement is to provide a detailed design specification to potential offerors and then award the work to the lowest-price offeror. It is far more difficult to examine the offerings in the commercial marketplace and determine which item offers best value.

SECTION I The Standard FAR Provisions

Informal Review of FAR Provisions

(30 minutes)

Learning Objective: Knowledge and understanding of the contents of the three FAR Part 12 provisions.

When FAR Part 12 solicitations are assembled, it is not necessary to include FAR provisions not prescribed in Part 12. This frequently causes confusion in contracting activities. We're going to look closely at each of the three FAR Part 12 provisions to review their origins and to determine for which FAR clauses they serve as substitutes.

First, we'll look at **FAR 52.212-1 Instructions to Offerors – Commercial Items.** This is what it contains:

(from FAR 52.219-22) <u>Standard Industrial Classification (SIC) Code and Small Business Size Standard</u>. The SIC code and small business size standard for this acquisition appear in Block 10 of the solicitation cover sheet (SF 1449). However, the small business size standard for a concern which submits an offer in its own name, but which proposes to furnish a item which it did not itself manufacture, is 500 employees.

(**new**) <u>Submission of Offers</u>. Submit offers to the office specified in this solicitation at or before the exact time specified in this solicitation. Offers may be submitted on the SF 1449, letterhead stationary, or as otherwise specified in the solicitation. As a minimum, offers must show—

- (1) The solicitation number;
- (2) The time specified for receipt;
- (3) The name and address of the offeror;
- (4) A technical description of the items being offered in sufficient detail to determine compliance with the requirements in the solicitation. This may include product literature, warranty provisions, or other documents, if necessary;
- (5) Terms of any express warranty;
- (6) Price and any discount terms;
- (7) "Remit to" address, if different than mailing address;
- (8) A completed copy of the representations and certifications at FAR 52.212-3;
- (9) Acknowledgment of solicitation amendments;

- (10) Past performance information, when included as an evaluation factor, to include recent and relevant contracts for the same or similar items and other references. At a minimum, this should include contract numbers, points of contact with telephone numbers and other relevant information; and
- (11) (new from 52.215-17(a)) If the offer is not submitted on the SF 1449, include a statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation. (52.215-18(c)) Offers that fail to furnish required representations or information, or take exception to the terms and conditions of the solicitation, may be excluded from consideration.
- (new from 52.215-19) Period for acceptance of offers. The offeror agrees to hold the prices in its offer firm for 30 calendar days from the date specified for receipt of offers, unless another time period is specified in an addendum to the solicitation.
- (52.215-9(d)) Product Samples. When required by the solicitation, product samples shall be submitted at or prior to the time specified for receipt of offers. Unless otherwise specified in this solicitation, these samples shall be submitted at no expense to the Government, and returned at the sender's request and expense, unless they are destroyed during preaward testing.
- (new) <u>Multiple Offers</u>. Offerors are encouraged to submit multiple offers presenting alternative commercial items for satisfying the requirements of this solicitation. Each offer submitted will be evaluated separately.
- (new concept in FAR 52.215-10) <u>Late Offers</u>. Offers or modifications of offers received at the address specified for the receipt of offers after the exact time specified for receipt of offers will not be considered.
- (New from FAR 52.215-16) Contract Award (not applicable to invitations for bids). The Government intends to evaluate offers and award a contract without discussions with offerors. Therefore, the offeror's initial offer should contain the offeror's best terms from a price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary. The Government may reject any or all offers if such action is in the public interest; accept other than the lowest offer; and waive informalities and minor irregularities in offers received.
- (FAR 52.215-16(d)) <u>Multiple Awards</u>. The Government may accept any item or group of items of an offer, unless the offeror qualifies the offer

by specific limitations. Unless otherwise provided in the Schedule, offers may not be submitted for quantities less than those specified. The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit prices offered, unless the offeror specifies otherwise in the offer.

(End of provision)

Now let's turn to the optional provision at **FAR 52.212-2 Evaluation - Commercial Items.**

(from FAR 52.215-16(a)) (a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors [Contracting Officer insert relative order of importance (see 15.605)] shall be used to evaluate offers:

[Contracting Officer insert the significant evaluation factors and subfactors, such as (i) technical capability of the item offered to meet the Government requirement; (ii) price; (iii) past performance (see 15.605)].

Technical and past performance, when combined, are [Contracting Officer insert relative importance of evaluation factors (see 15.605)].

(FAR 52.217-5) (b) Options. The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options shall not obligate the Government to exercise the option(s). (new from FAR 52.215-16(g)) The Government may determine that an offer is unacceptable if the prices proposed are materially unbalanced between line items or subline items.

(from FAR 52.215-16(e)) (c) A written award or acceptance of offer mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.

(End of Provision)

Now we'll look at **FAR 52.212-3 Offeror Representations and Certifications – Commercial Items.** This provision contains all the statutory representations and certifications that could apply to a Part 12 solicitation.

- (a) <u>Definitions</u>. As used in this provision:
- **(FAR 52.219-19(a))** Emerging small business means a small business concern whose size is no greater than 50 percent of the numerical size standard for the standard industrial classification code designated.
- **(FAR 52.219-1(b))** Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in this solicitation.
- **(FAR 52.219-2(a))** Small disadvantaged business concern means a small business concern that—
 - (1) Is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged or a publicly owned business, having at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals; and
 - (2) Has its management and daily business controlled by one or more such individuals. This term also means a small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian tribe or Native Hawaiian organization, or publicly owned business having at least 51 percent of its stock unconditionally owned by one or more of these entities which has its management and daily business controlled by members of an economically disadvantaged Indian tribe or Native Hawaiian organization and which meets the requirements of 13 CFR Part 124.
- (FAR 52.219-3(b)) Women-owned small business concern means a small business concern at least 51 percent owned by a woman or women or, in the case of any publicly owned business, at least 51 percent of the stock is owned by one or more women; and whose management and daily business operations are controlled by one or more women.
- **(FAR Case 94-780)** Women-owned business concern means a concern which is at least 51 percent owned by one or more women; or in the case of any publicly owned business, at least 51 percent of the stock of

which is owned by one or more women; and whose management and daily business operations are controlled by one or more women.

(from FAR 52.204-3) (b) Taxpayer Identification Number (TIN) (26 U.S.C. 6050M). (1) The offeror's TIN is If the offeror does not have a TIN, provide an explanation with your offer. If the offeror is owned or controlled by a common parent that files its Federal income tax returns on a consolidated basis including the offeror, provide the name and TIN of the common parent—
Name TIN
(from FAR 52.215-6 & 252.211-7020) (2) <u>Type of Business Organization</u> . The offeror represents—
(i) If the offeror is a U.S. entity, it operates as: a corporation incorporated under the laws of the State of providing medical and health care services, or engaged in the billing and collecting of payments for such services; an other corporate entity; a sole proprietorship; a partnership; a hospital or extended care facility described in 26 CFR 501(c)(3) that is exempt from taxation under 26 CFR 501(a).
(ii) If the offeror is a foreign entity, it operates as: an agency or instrumentality of a foreign government; or agency or instrumentality of a Federal, state or local Government
(c) Offerors must complete this paragraph (c) only if the resulting contract is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.
(FAR 52.219-1(a)) (1) <u>Small Business Concern</u> . The offeror represents and certifies as part of its offer that itis,is not a small business concern.
(FAR 52.219-2(a)) (2) <u>Small Disadvantaged Business Concern</u> . The offeror represents and certifies that itis,is not a small disadvantaged business concern.
(FAR 52.219-3(a)) (3) Women-Owned Small Business Concern. The offeror represents that it is not a women-owned small business concern.

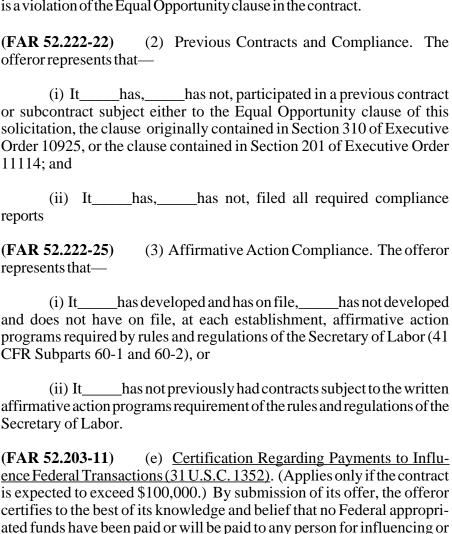
expected to exceed the simplified acquisition threshold.
(FAR Case 94-780) (4) Women-Owned Business Concern. The offeror represents that itis not, a women-owned business concern.
(from FAR 52.220-1) (5) Priority for Labor Surplus Area Concerns. Offeror identify the labor surplus areas in which costs to be incurred on account of manufacturing or production (by offeror or first-tier subcontractors) amount to more than 50 percent of the contract price:
(6) <u>Small Business Size for the Small Business Competitiveness</u> <u>Demonstration Program and for the Targeted Industry Categories under the Small Business Competitiveness Demonstration Program. [Complete only if the offeror has certified itself to be a small business concern under the size standards for this solicitation.]</u>
(FAR 52.219-19(b)) (i) [Complete only for solicitations in the four designated industry groups.] The offeror represents and certifies as part of its offer that it is not an emerging small business.
(FAR 52.219-21) (ii) [Complete only for solicitations in targeted industry categories expected to result in an award in excess of \$25,000.] Offeror represents and certifies as follows:
(A) Offeror's number of employees for the past 12 months (check this column if size standard stated in the solicitation is expressed in terms of number of employees); or (B) Offeror's average annual gross revenue for the last 3 fiscal years (check this column if size standard stated in the solicitation is expressed in terms of annual receipts)
(Check one of the following):
Employees Revenues 50 or fewer \$1 million or less 51 - 100 \$1,000,001 - \$2 million 101 - 250 \$2,000,001 - \$3.5 million 251 - 500 \$3,500,001 - \$5 million 501 - 750 \$5,000,001 - \$10 million 751 - 1,000 \$10,000,001 - \$17 million Over 1,000 Over \$17 million

(d) Certifications and representations required to implement

provisions of Executive Order 11246—

(FAR 52.222-21)(1) <u>Certification of Non-segregated Facilities</u>. (Applies only if the contract amount is expected to exceed \$10,000)—

By submission of this offer, the offeror certifies that it does not and will not maintain or provide for its employees, any facilities that are segregated on the basis of race, color, religion, or national origin because of habit, local custom, or otherwise and that it does not and will not permit its employees to perform their services at any location where segregated facilities are maintained. The offeror agrees that a breach of this certification is a violation of the Equal Opportunity clause in the contract.



attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress or an employee of a Member of Congress on his or her behalf in connection with the award of

any resultant contract.

Note: The two Buy Amercian Certificates do not apply to DoD.

- (FAR 52.225-8) (f) <u>Buy American Act Trade Agreements Balance of Payments Program Certificate</u>. (Applies only if FAR clause 52.225-9, Buy American Act Trade Agreement Balance of Payments Program, is included in this solicitation.)
- (1) The offeror hereby certifies that each end product, except those listed in paragraph (f)(2) of this provision, is a domestic end product (as defined in the clause entitled "Buy American Act Trade Agreements Balance of Payments Program") and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States, a designated country, a North American Free Trade Agreement (NAFTA) country, or a Caribbean Basin country, as defined in section 25.401 of the Federal Acquisition Regulation.
 - (2) Excluded End Products:

LINE ITEM NO.

COUNTRY OF ORIGIN

(List as necessary)

- (3) Offers will be evaluated by giving certain preferences to domestic end products, designated country end products, NAFTA country end products, and Caribbean Basin country end products over other end products. In order to obtain these preferences in the evaluation of each excluded end product listed in paragraph (f)(2) of this provision, offerors must identify and certify below those excluded end products that are designated or NAFTA country end products, or Caribbean Basin country end products. Products that are not identified and certified below will not be deemed designated country end products, NAFTA country end products, or Caribbean Basin country end products. Offerors must certify by inserting the applicable line item numbers in the following:
- (i) The offeror certifies that the following supplies qualify as "designated or NAFTA country end products" as those terms are defined in the clause entitled "Buy American Act Trade Agreements Balance of Payments Program:"

(Insert line item numbers)

(ii) The offeror certifies that the following supplies qualify as "Caribbean Basin country end products" as that term is defined in the clause entitled "Buy American Act - Trade Agreements - Balance of Payments Program":

(Insert line item numbers)

- (4) Offers will be evaluated in accordance with Part 25 of the Federal Acquisition Regulation.
- (FAR 52.225-20) (g) <u>Buy American Act North American Free Trade Agreement (NAFTA) Implementation Act Balance of Payments Program Certificate</u>. (Applies only if FAR clause 52.225-21, Buy American Act North American Free Trade Agreement (NAFTA) Implementation Act Balance of Payments Program, is included in this solicitation.)
- (1) The offeror hereby certifies that each end product, except those listed in paragraph (g)(2) of this provision, is a domestic end product (as defined in the clause entitled "Buy American Act North American Free Trade Agreement (NAFTA) Implementation Act Balance of Payments Program" and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.
 - (2) Excluded End Products:

Line Item No.

Country of Origin

(List as necessary)

(3) Offers will be evaluated by giving certain preferences to domestic end products or NAFTA country end products over other end products. In order to obtain these preferences in the evaluation of each excluded end product listed in paragraph (g)(2) of this provision, offerors must identify and certify below those excluded end products that are NAFTA country end products. Products that are not identified and certified below will not be deemed NAFTA country end products. Offerors must certify by inserting the applicable line item numbers in the following:

The offeror certifies that the following supplies qualify as "NAFTA country end products" as that term is defined in the clause entitled "Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program:"

(Insert line item numbers)

(4) Offers will be evaluated in accordance with FAR Part 25.

(FAR 52.209-5) (h) Certification Regarding Debarment, Suspension or

52.212-1

FEDERAL ACQUISITION REGULATION (FAR)

of final settlement of the contract. Upon the receipt of a written request for an extension, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as, in the judgement of the Contracting Officer, is justified.

(End of clause)

52.212-1 Instructions to Offerors—Commercial Items.

As prescribed in 12.301(b)(1), insert the following pro-

INSTRUCTIONS TO OFFERORS—COMMERCIAL ITEMS (OCT 1995)

- (a) Standard industrial classification (SIC) code and small business size standard. The SIC code and small business size standard for this acquisition appear in Block 10 of the solicitation cover sheet (SF 1449). However, the small business size standard for a concern which submits an offer in its own name, but which proposes to furnish an item which it did not itself manufacture, is 500 employees.
- (b) Submission of offers. Submit signed and dated offers to the office specified in this solicitation at or before the exact time specified in this solicitation. Offers may be submitted on the SF 1449, letterhead stationery, or as otherwise specified in the solicitation. As a minimum, offers must show—
 - (1) The solicitation number:
 - (2) The time specified in the solicitation for receipt of offers;
 - (3) The name, address, and telephone number of the offeror;
 - (4) A technical description of the items being offered in sufficient detail to evaluate compliance with the requirements in the solicitation. This may include product literature, or other documents, if necessary;
 - (5) Terms of any express warranty;
 - (6) Price and any discount terms;
 - (7) "Remit to" address, if different than mailing address:
 - (8) A completed copy of the representations and certifications at FAR 52.212-3;
 - (9) Acknowledgment of Solicitation Amendments;
 - (10) Past performance information, when included as an evaluation factor, to include recent and relevant contracts for the same or similar items and other references (including contract numbers, points of contact with telephone numbers and other relevant information); and
 - (11) If the offer is not submitted on the SF 1449, include a statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation. Offers that fail to furnish required representations or information, or reject the terms and conditions of the solicitation may be excluded from consideration.
- (c) Period for acceptance of offers. The offeror agrees to hold the prices in its offer firm for 30 calendar days from 52-30

the date specified for receipt of offers, unless another time period is specified in an addendum to the solicitation.

- (d) Product samples. When required by the solicitation, product samples shall be submitted at or prior to the time specified for receipt of offers. Unless otherwise specified in this solicitation, these samples shall be submitted at no expense to the Government, and returned at the sender's request and expense, unless they are destroyed during preaward testing.
- (e) Multiple offers. Offerors are encouraged to submit multiple offers presenting alternative terms and conditions or commercial items for satisfying the requirements of this solicitation. Each offer submitted will be evaluated separately.
- (f) Late offers. Offers or modifications of offers received at the address specified for the receipt of offers after the exact time specified for receipt of offers will not be considered.
- (g) Contract award (not applicable to Invitation for Bids). The Government intends to evaluate offers and award a contract without discussions with offerors. Therefore, the offeror's initial offer should contain the offeror's best terms from a price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary. The Government may reject any or all offers if such action is in the public interest; accept other than the lowest offer; and waive informalities and minor irregularities in offers received.
- (h) Multiple awards. The Government may accept any item or group of items of an offer, unless the offeror qualifies the offer by specific limitations. Unless otherwise provided in the Schedule, offers may not be submitted for quantities less than those specified. The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit prices offered, unless the offeror specifies otherwise in the offer.
- (i) Availability of requirements documents cited in the solicitation. (1) The Index of Federal Specifications, Standards and Commercial Item Descriptions and the documents listed in it may be obtained from the General Services Administration, Federal Supply Service Bureau, Specifications Section, Suite 8100, 470 L'Enfant Plaza, SW, Washington, DC 20407 ((202) 755-0325/0326).
 - (2) The DOD Index of Specifications and Standards (DODISS) and documents listed in it may be obtained from the Standardization Documents Desk, Building 4D, 700 Robbins Avenue, Philadelphia, PA 19111-5094 (telephone (215) 697-2569).
 - (i) Automatic distribution may be obtained on a subscription basis.
 - (ii) Individual documents may be ordered from the Telespecs ordering system by touch-tone telephone. A customer number is required to use this service and can be obtained from the Standardization

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-3

Documents Order Desk or the Special Assistance Desk (telephone (610) 607-2667/2179).

(3) Nongovernment (voluntary) standards must be obtained from the organization responsible for their preparation, publication or maintenance.

(End of provision)

52.212-2 Evaluation—Commercial Items

As prescribed in 12.301(c), the Contracting Officer may insert a provision substantially as follows:

EVALUATION—COMMERCIAL ITEMS (OCT 1995)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors shall be used to evaluate offers:

[Contracting Officer shall insert the significant evaluation factors, such as (i) technical capability of the item offered to meet the Government requirement; (ii) price; (iii) past performance (see FAR 15.605) and include them in the relative order of importance of the evaluation factors, such as in descending order of importance.]

Technical and past performance, when combined, are ______ [Contracting Officer state, in accordance with FAR 15.605, the relative importance of all other evaluation factors, when combined, when compared to price.]

- (b) Options. The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).
- (c) A written notice of award or acceptance of an offer, mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer, shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.

(End of Provision)

52.212-3 Offeror Representations and Certifications— Commercial Items.

As prescribed in 12.301(b)(2), insert the following provision:

OFFEROR REPRESENTATIONS AND CERTIFICA-TIONS—COMMERCIAL ITEMS (OCT 1995)

(a) Definitions. As used in this provision:

"Emerging small business" means a small business con-

cern whose size is no greater than 50 percent of the numerical size standard for the standard industrial classification code designated.

"Small business concern" means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria in 13 CFR Part 121 and size standards in this solicitation.

"Small disadvantaged business concern" means a small business concern that—

- (1) Is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business, having at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals, and
- (2) Has its management and daily business controlled by one or more such individuals. This term also means a small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian tribe or Native Hawaiian organization, or a publicly owned business having at least 51 percent of its stock unconditionally owned by one or more of these entities, which has its management and daily business controlled by members of an economically disadvantaged Indian tribe or Native Hawaiian organization and which meets the requirements of 13 CFR Part 124.

"Women-owned small business concern" means a small business concern—

- (1) Which is at least 51 percent owned by one or more women or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and
- (2) Whose management and daily business operations are controlled by one or more women.

"Women-owned business concern" means a concern which is at least 51 percent owned by one or more women; or in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more women.

52.212-3

FEDERAL ACQUISITION REGULATION (FAR)

Utteror is an agency or instrumentality of a	businesses in one of the four designated industry
Federal, state, or local government;	groups (DIGs).) The offeror represents as part of its
Other. State basis.	offer that it \square is, \square is not an emerging small busi-
(2) Corporate Status.	ness.
☐ Corporation providing medical and health care	(ii) (Complete only for solicitations indicated in
services, or engaged in the billing and collecting of pay-	an addendum as being for one of the targeted indus-
ments for such services;	try categories (TICs) or four designated industry
Other corporate entity;	groups (DIGs).) Offeror represents and certifies as
□ Not a corporate entity:	follows:
☐ Sole proprietorship	(A) Offeror's number of employees for the past
☐ Partnership	12 months (check the Employees column if size
☐ Hospital or extended care facility described in	standard stated in the solicitation is expressed in
26 CFR 501(c)(3) that is exempt from taxation under 26	terms of number of employees); or
CFR 501(a).	(B) Offeror's average annual gross revenue for
(3) Common Parent.	the last 3 fiscal years (check the Average Annual
☐ Offeror is not owned or controlled by a common	Gross Number of Revenues column if size stan-
parent:	dard stated in the solicitation is expressed in terms
☐ Name and TIN of common parent:	of annual receipts).
Name	(Check one of the following):
TIN	
(c) Offerors must complete the following representa-	Average Annual
tions when the resulting contract is to be performed inside	Number of Employees Gross Revenues
the United States, its territories or possessions, Puerto	50 or fewer \$1 million or less
Rico, the Trust Territory of the Pacific Islands, or the	51 - 100 \$1,000,001 - \$2 million
District of Columbia. Check all that apply.	101 - 250 \$2,000,001 - \$3.5 million
(1) Small business concern. The offeror represents as part	251 - 500 \$3,500,001 - \$5 million
of its offer that it \square is, \square is not a small business concern.	501 - 750 \$5,000,001 - \$10 million
(2) Small disadvantaged business concern. The	751 - 1,000 \$10,000,001 - \$17 million
offeror represents and certifies that it \square is, \square is not a	Over 1,000 Over \$17 million
small disadvantaged business concern.	i
(3) Women-owned small business concern. The	(d) Certifications and representations required to
offeror represents that it \square is, \square is not a women-owned	implement provisions of Executive Order 11246—
small business concern.	(1) Certification of non-segregated facilities.
Note: Complete paragraphs (c)(4) and (c)(5) only if	(Applies only if the contract amount is expected to
this solicitation is expected to exceed the simplified	exceed \$10,000)—
acquisition threshold.	By submission of this offer, the offeror certifies that it
(4) Women-owned business concern. The offeror	does not and will not maintain or provide for its employ-
represents that it \square is, \square is not, a women-owned busi-	ees, any facilities that are segregated on the basis of race,
ness concern.	color, religion, or national origin because of habit, local
(5) Tie bid priority for labor surplus area concerns.	custom, or otherwise and that it does not and will not
If this is an invitation for bid, small business offerors	permit its employees to perform their services at any
may identify the labor surplus areas in which costs to be	location where segregated facilities are maintained. The
incurred on account of manufacturing or production (by	offeror agrees that a breach of this certification is a viola-
offeror or first-tier subcontractors) amount to more than	tion of the Equal Opportunity clause in the contract.
50 percent of the contract price:	(2) Previous Contracts and Compliance. The offeror
•	represents that—
(6) Small Business Size for the Small Business	(i) It ☐ has, ☐ has not, participated in a previous
Competitiveness Demonstration Program and for the	contract or subcontract subject either to the Equal
Targeted Industry Categories under the Small Business	Opportunity clause of this solicitation, the clause
Competitiveness Demonstration Program. [Complete	originally contained in Section 310 of Executive
only if the offeror has certified itself to be a small busi-	Order 10925, or the clause contained in Section 201
ness concern under the size standards for this solicita-	of Executive Order 11114; and
tion.]	(ii) It ☐ has, ☐ has not, filed all required compli-
(i) (Complete only for solicitations indicated in	ance reports.

an addendum as being set-aside for emerging small

52-30.2

(3) Affirmative Action Compliance. The offeror

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-3

represents that-

- (i) It □ has developed and has on file, □ has not developed and does not have on file, at each establishment, affirmative action programs required by rules and regulations of the Secretary of Labor (41 CFR Subparts 60-1 and 60-2), or
- (ii) It □ has not previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor.
- (e) Certification Regarding Payments to Influence Federal Transactions (31 U.S.C. 1352). (Applies only if the contract is expected to exceed \$100,000.) By submission of its offer, the offeror certifies to the best of its knowledge and belief that no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress or an employee of a Member of Congress on his or her behalf in connection with the award of any resultant contract.
- (f) Buy American Act—Trade Agreements—Balance of Payments Program Certificate. (Applies only if FAR clause 52.225-9, Buy American Act - Trade Agreement - Balance of Payments Program, is included in this solicitation.)
 - (1) The offeror hereby certifies that each end product, except those listed in paragraph (f)(2) of this provision, is a domestic end product (as defined in the clause entitled "Buy American Act Trade Agreements—Balance of Payments Program") and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States, a designated country, a North American Free Trade Agreement (NAFTA) country, or a Caribbean Basin country, as defined in section 25.401 of the Federal Acquisition Regulation.
 - (2) Excluded End Products:

LINE ITEM NO. COUNTRY OF ORIGIN

(List as necessary)

- (3) Offers will be evaluated by giving certain preferences to domestic end products, designated country end products, NAFTA country end products, and Caribbean Basin country end products over other end products. In order to obtain these preferences in the evaluation of each excluded end product listed in paragraph (f)(2) of this provision, offerors must identify and certify below those excluded end products that are designated or NAFTA country end products, or Caribbean Basin country end products. Products that are not identified and certified below will not be deemed designated country end products, NAFTA country end products, or Caribbean Basin country end products. Offerors must certify by inserting the applicable line item numbers in the following:
 - (i) The offeror certifies that the following supplies

qualify as "designated or NAFTA country end products" as those terms are defined in the clause entitled "Buy American Act - Trade Agreements - Balance of Payments Program:"

(Insert line item numbers)

(ii) The offeror certifies that the following supplies qualify as "Caribbean Basin country end products" as that term is defined in the clause entitled "Buy American Act - Trade Agreements - Balance of Payments Program":

(Insert line item numbers)

- (4) Offers will be evaluated in accordance with FAR Part 25.
- (g) Buy American Act North American Free Trade Agreement (NAFTA) Implementation Act—Balance of Payments Program Certificate. (Applies only if FAR clause 52.225-21, Buy American Act—North American Free Trade Agreement (NAFTA) Implementation Act—Balance of Payments Program, is included in this solicitation.)
 - (1) The offeror hereby certifies that each end product, except those listed in paragraph (g)(2) of this provision, is a domestic end product (as defined in the clause entitled "Buy American Act—North American Free Trade Agreement (NAFTA) Implementation Act—Balance of Payments Program" and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.
 - (2) Excluded End Products:

LINE ITEM NO. COUNTRY OF ORIGIN

(List as necessary)

(3) Offers will be evaluated by giving certain preferences to domestic end products or NAFTA country end products over other end products. In order to obtain these preferences in the evaluation of each excluded end product listed in paragraph (g)(2) of this provision, offerors must identify and certify below those excluded end products that are NAFTA country end products. Products that are not identified and certified below will not be deemed NAFTA country end products. Offerors must certify by inserting the applicable line item numbers in the following:

The offeror certifies that the following supplies qualify as "NAFTA country end products" as that term is defined in the clause entitled "Buy American Act -

52-30.3

52.212-4

	_
	_
(Insert line item numbers)	_
(4) Offers will be evaluated in accordance wi Part 25.	th FAI
(h) Certification Regarding Debarment, Suspen	sion · o
eligibility for Award (Executive Order 12549)	
feror certifies, to the best of its knowledge and	
at—	
(1) The offeror and/or any of its principals	☐ are
☐ are not presently debarred, suspended, propo	sed fo
debarment, or declared ineligible for the award	of con
tracts by any Federal agency, and	
(2) Have, have not, within a three-year	
preceding this offer, been convicted of or had	
judgment rendered against them for: commiss	
fraud or a criminal offense in connection with obtaining	
attempting to obtain, or performing a Federal,	
local government contract or subcontract; viola	
Federal or state antitrust statutes relating to the s	
sion of offers; or commission of embezzlement	
forgery, bribery, falsification or destruction of r	
making false statements, or receiving stolen pr and \square are, \square are not presently indicted for, or other statements are not presently indicted for an are not presently indicted for a statement of the statements.	
criminally or civilly charged by a Government	
with, commission of any of these offenses.	enuty
(i) Procurement Integrity Certification (41	II S C
423). (Applies only if the contract is expect	
exceed \$100,000.)	164 10
I, the undersigned, am the officer or em	nlove
responsible for the preparation of this offer. I	
to the best of my knowledge and belief, that ei	ther—
☐ I have no information, or	
☐ I have disclosed information to the Cont	racting
Officer concerning a violation or possible vi	
of subsection (a), (b), (d) or (f) of 41 U.S.C	
Procurement Integrity, or its implementing	
tions that may have occurred during the con-	
this procurement.	

52.212-4 Contract Terms and Conditions -Commercial Items.

As prescribed in 12.301(b)(3), insert the following clause:

(End of Provision)

CONTRACT TERMS AND CONDITIONS— **COMMERCIAL ITEMS (OCT 1995)**

(a) Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the 52-30.4

FEDERAL ACQUISITION REGULATION (FAR)

requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The Government must exercise its postacceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

- (b) Assignment. The Contractor or its assignee's rights to be paid amounts due as a result of performance of this contract, may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727).
- (c) Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.
- (d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.
- (e) Definitions. The clause at FAR 52.202-1, Definitions, is incorporated herein by reference.
- (f) Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.
- (g) Invoice. The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized,) to the address designated in the contract to receive invoices. An invoice must include-
 - (1) Name and address of the Contractor;
 - (2) Invoice date;
 - (3) Contract number, contract line item number and, if applicable, the order number;
 - (4) Description, quantity, unit of measure, unit price and extended price of the items delivered;

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Section J Solicitation Preparation - Using the SF 1449

Informal Lecture and View-graphs

(75 minutes)

Learning Objective: Knowledge sufficient to prepare a successful best value solicitation for acquiring commercial items.

The solicitation in Section J is based on the Market Research report found in Exhibit B-1. This report is to support the acquisition of a security system for the Desert Shield/Storm Museum.

Building a Request for Proposals Using the Standard Form 1449

Viewgraph J-1

1. For the purposes of this exercise we'll be using a request for proposals to acquire the services necessary to provide system design consulting, system installation and test, and training for operations personnel. Extended warranty and training options will be required. These services clearly fall within the definition of "commercial item" found in FAR 2.101:

2.101 Definitions.

* * * * * * <u>Commercial item</u> means—

- (e) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (a), (b), (c), or (d) of this definition, and if the source of such services—
- (1) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and
- (2) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;

The market research report states that over 20,000 commercial suppliers of security and surveillance systems were identified. A capabilities/product review narrowed the list to 19 potential sources for meeting this requirement. The report suggested that the consulting, purchasing, installing, and training can best be done by a single contractor—a turnkey contract. The design and consulting services, systems installation and test, and training for operators have been separated from the hardware acquisition. We are going to build the request for proposals to perform these services.

SELECT THE FORMAT FOR THE SOLICITATION

Review choice of SF1449 or combined synopsis/solicitation

Viewgraph J-2

2. Because these services meet the definition of a commercial item there are only three solicitation vehicles available; FACNET, the combined/synopsis solicitation, and the SF 1449. We're going to solicit using the SF 1449. This vehicle is preferred because this solicitation will be somewhat complex and neither FACNET nor the combined sysopsis/solicitation would be appropriate.

12.204 Solicitation/contract form.

The Standard Form 1449, Solicitation/Contract/Order for Commercial Items, shall be used by the contracting officer when issuing written solicitations and awarding contracts and placing orders for commercial items. This form contains the information necessary for solicitations and contracts. The form may also be used for documenting receipt, inspection and acceptance of commercial items. Other forms shall not be used for solicitation or award of contracts or orders for the acquisition of commercial items.

ESTABLISH DATES AND TIMES FOR RECEIPT OF OFFERS

Solicitations for commercial items are no longer required to remain open for 30 days.

Viewgraph J-3

3. Establish opening dates and times [Block 8 of the SF 1449].

Solicitations for commercial items are no longer required to remain open for 30 days [FAR 5.203(b)]. The contracting officer should consider the circumstances of the particular acquisition (including customary commercial practice, of course) and establish a response time that will allow a reasonable opportunity to respond. In our example, we'll use 30 days.

Note the provision regarding late offers at 52.212-1(f). There's no mention of "government mishandling" or "sent by certified orregistered mail," etc. In plain English, what that says is "LATE IS LATE." The offeror assumes full responsibility and risk for timely delivery of the offer. If it doesn't arrive before the deadline, for whatever reason, it's not considered. A new twist not considered by the drafters of the commercial items rule has recently been introduced into the equation: What happens when the government agency was shut down? This question may result in a change to the current rule.

4. Now lets look at the SF 1449. There is a copy in your book. (There's also a copy of Optional Form 336, which is a good form to use to supplement Blocks 19 through 24 of the SF 1449.) If you look over the form now, I think you won't find anything unique to commercial items that require discussion until you reach Block 27. However, before we look at block 27, let's look at Blocks 10 through 14 for a minute.

Remember the SF 1449 is a mandatory form for solicitations and awards for commercial items. (Offerors are not required to use the form to submit their offers; they may submit offers on their letterhead.) Several agencies have waived the mandatory use of the SF 1449 because their automated systems have not been programmed to accept the new form. If you are not using the SF 1449 for a Part 12 procurement, be aware that you must include

an addendum to you solicitation that includes the information in Blocks 10 through 14 that does not appear on other forms. Also be aware that other forms generally reference the uniform contract format and clauses that do not apply to a Part 12 solicitation. The solicitation must also be tailored to overcome these problems if the SF 1449 is not being used.

Block 27 is used to indicate whether this is a solicitation [27a] or contract [27b]. In each case, the contracting officer is required to indicate whether or not addenda are attached.

Block 29 should be completed for contract award referencing the contractor's offer and any additions or changes should be indicated.

Blocks 32 through 42 may be used for receiving, inspection and acceptance.

SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS Offeror to complete blocks 12, 17, 23, 24, & 30					I REQUISITION NUMBER			PAGE I OF		
2. CONTRACT NO.	3. AWARD/EFFECTIVE		4 ORDER NUMBER		5. SOLICITATION :	NUMBER		6. SOLICITATI	ON ISSUE DATE	
7. FOR SOLICITATION	A. NAME	·			B. TELEPHONE (No.	o Collect Call.	n	8. OFFER DUE LOCAL TIME	DATE	
INFORMATION CALL	•									
9. ISSUED BY		CODE	N00600	10. THIS ACQUI		DESTINA	ERY FOR FOB TION UNLESS MARKED	12. DISCOUNT	TERMS	
				_		☐ SEE SCHEDULE ☐ 13a. THIS CONTRACT IS A			A DATED ORDER	
			SET-ASIDI SMALL SMALL SMALL			13a. T		S A RATED ORI S (15 CFR 700)		
					SMALL DISADV. BUSINSESS		13b. RATING			
				SIC:		14. METHOD OF SOLICITATION				
15. DELIVER TO:		CODE	,	SIZE STANDAR		<u> </u>	☐ RFQ	CODE C	RFP	
				IS DAVAGENT	WILL DE MADE DV			CODE		
TELEPHONE:		FACILITY		186. SUBMIT I	WILL BE MADE BY	S SHOWN IN	BLOCK 18a UNLE	SS BLOCK BELO	W IS CHECKED:	
17b. CHECK IF REMITTANCE IS DIFFE	RENT AND PUT SUCH ADDRI 20.	SS IN OFFI	<u>er</u>	<u> </u>	SEE ADDENDUM 21.	22.	23.		24.	
ITEM NO.	SCHEDULE OF SUPP	JES/SERVI	CES		QUANTITY	UNIT	UNIT PRI	CE	AMOUNT	
THE PERSON NAMED OF THE PE	(Attach Continuation S	heet as N	lecessary)				16 TYOTAL AW	APD AMOUNT /F	or Govs.Use Only)	
25. ACCOUNTING AND APPROPRIATION 27a. SOLICITATIONS INCORPORATE	BY REFERENCE FAR 52.21	2-1, 52.21	2-4. FAR 52.212-3	AND 52.212-5 AI	RE ATTACHED. ADD	ENDA 🗆 A	RE □ ARE NOT A	TTACHED.	or dom.osc onay)	
27b. CONTRACTS/PURCHASE ORDER	S INCORPORATE BY REFERE SIGN THIS DOCUMENT AN	NCE FAR	52.212-4. FAR 52.2 COPIES TO		AWARD OF CON	TRACT: RE	FERENCE	OFFER DAT	ED YOU	
OFFICE. CONTRACTOR AGREES DENTIFIED ABOVE AND ON A	S TO FURNISH AND DELIVE	R ALL ITE	MS SET PORTH OR O	INDITIONS	OFFER ON SOLI WHICH ARE SET	CITATION (I FORTH HEI	BLOCK 5), INCLUT BEIN, IS ACCEPTED	DING ANY ADDI DAS TO ITEMS:	TIONS OR CHANGE	
					STATES OF AMERICA	(SIGNATUR	E OF CONTRACTI	NG OFFICER)		
SPECIFIED HEREIN 30a. SIGNATURE OF OFFERORACONTRAC	CTOR			JIZ UNITED						
SPECIFIED HEREIN		30c. DAT	E SIGNED		CONTRACTING OFFI	CER		3ic. DATE	SIGNED	
SPECIFIED HEREIN 30%. SIGNATURE OF OFFEROR/CONTRAC 30%. NAME AND TITLE OF SIGNER (TYPE	: OR PRINT)	30c. DAT	E SIGNED	31b. NAME OF	CONTRACTING OFFI		CHED NI DADER			
SPECIFIED HEREIN 30a. SIGNATURE OF OFFEROR/CONTRAC 30b. NAME AND TITLE OF SIGNER (TYPE 32a. QUANTITY IN COLUMN 20 HAS BEE	COR PRINT)			31b. NAME OF	CONTRACTING OFFI		CHER NUMBER	35. AMOU	SIGNED VERUFIED CT FOR	
SPECIFIED HEREIN 30%. SIGNATURE OF OFFEROR/CONTRAC 30%. NAME AND TITLE OF SIGNER (TYPE	COR PRINT)	AND CONF	ORMS TO THE	31b. NAME OF	CONTRACTING OFFI		CHER NUMBER	35. AMOU	VT VERIFIED CT FOR	
SPECIFIED HEREIN 30a. SIGNATURE OF OFFERONCONTRAC 30b. NAME AND TITLE OF SIGNER (TYPE 32a. QUANTITY IN COLUMN 20 HAS BEE	OR PRINT) IN ED ACCEPTED, CONTRACT.	AND CONF	ORMS TO THE	31b. NAME OF 33. SHIP NUM PARTIAL 36. PAYMENT	BER FINAL	34. DO VOU	·	35. AMOU CORRE	NT VERIFIED CT FOR NUMBER	
SPECIFIED HEREIN 30% SIGNATURE OF OFFEROR/CONTRAC 30% NAME AND TITLE OF SIGNER (TYPE 32% QUANTITY IN COLUMN 20 HAS BEE RECEIVED INSPECTS 32% SIGNATURE OF AUTHORIZED GOV	EN ACCEPTED. CONTRACT. T. REPRESENTATIVE	AND CONF	ORMS TO THE NOTED 2c. DATE	31b. NAME OF 33. SHIP NUM PARTIAL 36. PAYMENT	BER FINAL TE PARTIAL UNT NUMBER	34. DO VOU	ıL	35. AMOU CORRE 37. CHECK	NT VERIFIED CT FOR NUMBER	
SPECIFIED HEREIN 30% SIGNATURE OF OFFEROR/CONTRAC 30% NAME AND TITLE OF SIGNER (TYPE 32% QUANTITY IN COLUMN 20 HAS BEE RECEIVED INSPECTS 32% SIGNATURE OF AUTHORIZED GOV	EN ACCEPTED. CONTRACT. T. REPRESENTATIVE	AND CONF EXCEPT AS	ORMS TO THE NOTED 2c. DATE	31b. NAME OF 33. SHIP NUM PARTIAL 36. PAYMENT COMPLET 38. S/R ACCO 42a. RECEIVE	BER FINAL TE PARTIAL UNT NUMBER	34. DO VOU	ıL	35. AMOU CORRE 37. CHECK	NT VERIFIED CT FOR NUMBER	
SPECIFIED HEREIN 30% SIGNATURE OF OFFEROR/CONTRAC 30% NAME AND TITLE OF SIGNER (TYPE 32% QUANTITY IN COLUMN 20 HAS BEE RECEIVED INSPECTS 32% SIGNATURE OF AUTHORIZED GOV	EN ACCEPTED. CONTRACT. T. REPRESENTATIVE	AND CONF EXCEPT AS	ORMS TO THE NOTED 2c DATE	31b. NAME OF 33. SHIP NUM PARTIAL 36. PAYMENT COMPLET 38. S/R ACCO 42a. RECEIVE 42b. RECEIVE	BER FINAL FINAL DBY (Print)	34. DO VOU	ıL	35. AMOU CORRE 37. CHECK	NT VERIFIED CT FOR NUMBER	

CONTINUATION SHEET			JMENT BEING CONTIN	IUED	PAGE	PAGE	
NAME OF OFFEROR OR CO	NTRACTOR						
ITEM NO.	SUPPLIES/SER	VICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT	
				Ì	i		
					}		
						:	
	•						
ISN 7540-01-152-8067					OPTK Spons	ONAL FORM 336 sored by GSA 48 CFR) 53.110	

TAILORING THE INSTRUCTIONS TO OFFERORS

Solicitation Provision at FAR 52.212-1
Instructions to Offerors—
Commercial items

Viewgraph J-4

5. Tailoring the Solicitation Provision at FAR 52.212-1

Part 12 allows contracting officers to accept offers showing different terms and conditions. Your solicitation should indicate which terms and conditions are negotiable (i.e., allow consideration of alternatives that may be offered) and which are not. Remember that there are differences in seller and buyer terms and you will not be required to accept an offeror's terms. Your market leverage is likely to be the key to successful negotiations.

STATUTORY TERMS AND CONDITIONS

Clause at FAR 52.212-5
Terms and Conditions Necessary
to Implement Statutes

Viewgraph J-5

6. Terms and Conditions Necessary to Implement Statutes

The clause at FAR 52.212-5 can not be incorporated by reference because they require the contracting officer to indicate the sections that are applicable to the solicitation or contract. Contracting officers should use the prescriptions that appear in the appropriate parts of the FAR to indicate which statutory representations and certifications or contract clauses are applicable to the acquisition.

Note: If FACNET or electronic contracting is used, only the applicable sections need to be cited. The entire provision or clause need not be transmitted.

CONTRACT CLAUSE LIMITATION

- Necessary to implement statutes or executive orders
- Consistent with standard commercial practice
- Standard Part 12 provisions and clauses

Viewgraph J-6

7. Contract Clause Limitation.

Remember there is a statutory limitation on the types of clauses that may be included in a contract for commercial items. They must be:

- a. Necessary to implement statutes or executive orders, which was taken care of through the provision at 52.212-3 and the clause at 52.212-5, and
- b. Consistent with standard commercial practice. This requirement is implemented through use of the Standard Part 12 Provisions and Clauses, and the inclusion of any additional provision or clause that market research indicates is customary commercial practice. Such provisions or clauses are included by addenda.

THE STANDARD WARRANTY IN FAR 52.212-4

Warranty

The contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.

Viewgraph J-8

- 8. Adding Addenda.
- 9. Now let's look at the warranty section of the clause at FAR 52.212-4. The standard warranties that the seller provides to the Government under the standard terms and conditions are known

as "implied warranties" of merchantability and fitness for a particular purpose. These warranties are described at FAR 12.404(a).

The implied warranty of merchantability provides that an item is reasonably fit for the ordinary purposes for which such items are used. The items must be of at least average, fair or medium-grade quality, and must be comparable in quality to those that will pass without objection in the trade or market for items of the same description. Exercising the government's rights under this warranty is a matter that contract administration personnel will be trained in.

The implied warranty of fitness for a particular purpose provides that an item is fit for use for the particular purpose for which the Government will use the item. The Government can rely upon an implied warranty of fitness for particular purpose when –

- (1) The seller knows the particular purpose for which the Government intends to use the item; and
- (2) The Government relied upon the contractor's skill and judgment that the item would be appropriate for that particular purpose.

When building a Part 12 solicitation, it is important that the requirements description convey to potential offerors the particular purpose for which the Government intends to use the item. This can best be conveyed through following FAR Part 11 and stating requirements in terms of function to be performed, performance required, and essential physical characteristics. We can see that FAR Part 11 is not simply a broad policy; it is a very specific requirement. The extent to which this direction is implemented has a direct effect on the warranty for a commercial item.

To the extent we rely on the seller's assurance of conformance as affecting a warranty, so to the <u>extent we rely on the contractor's skill and judgment that an item would be appropriate for our purposes affects our warranty.</u> If our evaluation criteria simply differentiated among competing offers, we can be reasonably assured of the implied warranty of fitness for the particular purpose after acceptance of the items. However, if our evaluation of offers includes extensive testing by which we assured ourselves that the items offered were fit for the purpose we intended to use them, we can hardly assert that we relied on the seller's skill and judgment that the items would meet our needs.

12.404 Warranties.

- (a) Implied warranties. The Government's post-award rights contained in 52.212-4 are the implied warranty of merchantability, the implied warranty of fitness for particular purpose and theremedies contained in the acceptance paragraph.
 - (1) The implied warranty of merchantability provides that an item is reasonably fit for the ordinary purposes for which such items are used. The items must be of at least average, fair or medium-grade quality and must be comparable in quality to those that will pass without objection in the trade or market for items of the same description.
 - (2) The implied warranty of fitness for a particular purpose provides that an item is fit for use for the particular purpose for which the Government will use the items. The Government can rely upon an implied warranty of fitness for particular purpose when
 - (i) The seller knows the particular purpose for which the Government intends to use the item; and
 - (ii) The Government relied upon the contractor's skill and judgment that the item would be appropriate for that particular purpose.
 - (3) Contracting officers should consult with legal counsel prior to asserting any claim for a breach of an implied warranty.

In the case of the security system requirement, our market research report indicated that there is a standard commercial warranty in the marketplace. Therefore, that warranty should be included in an addendum.

Addendum to the clause at 52-212-4

In addition to the warranty in Section (o) of the Standard Commercial Terms and Conditions clause of this contract, the contractor expressly warrants that all services covered by this agreement, including (but not limited to) the design, installation, and operation of the security system will conform to the specifications, drawings, samples, or descriptions furnished to or by Buyers, and will be merchantable, of good material and workmanship, and free from defect. This warranty shall extend for a period of one year after final acceptance by the government of the installation. In addition, Seller acknowledges that Seller knows of Buyer's

intended use and expressly warrants that all goods covered by this order which have been selected designed, manufactured, or assembled by Seller, based upon Buyer's stated use, will be fit and sufficient for the particular purposes intended by Buyer. The warranty shall not cover any damage to the system or its components that is caused by one or more of the following: misuse, abuse, vandalism, fire, Act of God, unprotected power surges, service by unauthorized persons, or other damage not related to the installation, manufacturing or operation of the installed or purchased equipment.

 The final step in building the solicitation would be including the statement of work and any other documents, exhibits, or attachments.

PART 12

ACQUISITION OF COMMERCIAL ITEMS

12.000 Scope of part.

This part prescribes policies and procedures unique to the acquisition of commercial items. It implements the Federal Government's preference for the acquisition of commercial items contained in Title VIII of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) by establishing acquisition policies more closely resembling those of the commercial marketplace and encouraging the acquisition of commercial items and components.

12.001 Definition.

"Subcontract," as used in this part, includes, but is not limited to, a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

SUBPART 12.1—ACQUISITION OF COMMERCIAL ITEMS—GENERAL

12.101 Policy.

Agencies shall-

- (a) Conduct market research to determine whether commercial items or nondevelopmental items are available that could meet the agency's requirements;
- (b) Acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency; and
- (c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency.

12.102 Applicability.

- (a) This part shall be used for the acquisition of supplies or services that meet the definition of commercial items at 2.101.
- (b) Contracting officers shall use the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate for the particular acquisition.
- (c) Contracts for the acquisition of commercial items are subject to the policies in other parts of this chapter. When a policy in another part of this chapter is inconsistent with

a policy in this part, this Part 12 shall take precedence for the acquisition of commercial items.

- (d) This part shall not apply to the acquisition of commercial items—
 - (1) At or below the micro-purchase threshold (see Subpart 13.6);
 - (2) Using the SF 44 (see section 13.505-3);
 - (3) Using the imprest fund (see Subpart 13.4); or
 - (4) Using the Governmentwide commercial purchase card (see Subpart 13.6).

SUBPART 12.2—SPECIAL REQUIREMENTS FOR THE ACQUISITION OF COMMERCIAL ITEMS

12.201 General.

Public Law 103-355 establishes special requirements for the acquisition of commercial items intended to more closely resemble those customarily used in the commercial marketplace. This subpart identifies those special requirements as well as other considerations necessary for proper planning, solicitation, evaluation and award of contracts for commercial items.

12.202 Market research and description of agency need.

- (a) Market research (see 10.001) is an essential element of building an effective strategy for the acquisition of commercial items and establishes the foundation for the agency description of need (see Part 11), the solicitation, and resulting contract.
- (b) The description of agency need must contain sufficient detail for potential offerors of commercial items to know which commercial products or services to offer. Generally, for acquisitions in excess of the simplified acquisition threshold, an agency's statement of need for a commercial item will describe the product or service to be acquired and explain how the agency intends to use the product or service in terms of function to be performed, performance requirement or essential physical characteristics. Describing the agency's need in these terms allows offerors to propose methods that will best meet the needs of the Government.
- (c) Follow the procedures in Subpart 11.2 regarding the identification and availability of specifications, standards and commercial item descriptions.

12.203 Procedures for solicitation, evaluation, and award.

Contracting officers shall use the policies unique to the

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acquisition of commercial items prescribed in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate for the particular acquisition. The contracting officer may use the streamlined procedure for soliciting offers for commercial items prescribed in 12.603.

12.204 Solicitation/contract form.

The Standard Form 1449, Solicitation/Contract/Order for Commercial Items, shall be used by the contracting officer when issuing written solicitations and awarding contracts and placing orders for commercial items. This form contains the information necessary for solicitations and contracts. The form may also be used for documenting receipt, inspection and acceptance of commercial items. Other forms shall not be used for solicitation or award of contracts or orders for the acquisition of commercial items.

12.205 Offers.

- (a) Where technical information is necessary for evaluation of offers, agencies should, as part of market research, review existing product literature generally available in the industry to determine its adequacy for purposes of evaluation. If adequate, contracting officers shall request existing product literature from offerors of commercial items in lieu of unique technical proposals.
- (b) Contracting officers should allow offerors to propose more than one product that will meet a Government need in response to solicitations for commercial items. The contracting officer shall evaluate each product as a separate offer.
- (c) Contracting officers may, considering the circumstances described in 5.203(b), allow fewer than 30 days response time for receipt of offers for commercial items.

12.206 Use of past performance.

Past performance should be an important element of every evaluation and contract award for commercial items. Contracting officers should consider past performance data from a wide variety of sources both inside and outside the Federal Government in accordance with the policies and procedures contained in Subpart 9.1, 13.106-1, or Subpart 15.6, as applicable.

12.207 Contract type.

Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. Indefinite-delivery contracts (see Subpart 16.5) may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. Use of any other contract type to acquire commercial items is prohibited.

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12.208 Contract quality assurance.

Contracts for commercial items shall rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance unless customary market practices for the commercial item being acquired include in-process inspection. Any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice.

12.209 Pricing of commercial items when contracting by negotiation.

- (a) When contracting by negotiation for commercial items, the policies and procedures in Part 15 shall be used to establish the reasonableness of prices.
- (b) The provisions and clauses prescribed in this part for the acquisition of commercial items do not include the provisions and clauses prescribed in Part 15 because they assume prices for commercial items will either (1) not be subject to the Truth in Negotiations Act because the contract price is below the dollar threshold for application of the Act; or (2) be based upon one of the exceptions to cost or pricing data requirements contained in 15.804-1(a)(1).
- (c) If the contracting officer determines it is appropriate to use the commercial item exception to cost or pricing data requirements (see 15.804-1(a)(2)), the provisions and clauses prescribed in 15.804-8 and 15.106 for this purpose shall be inserted in an addendum to the solicitation and contract.
- (d) If the contracting officer is required to obtain cost or pricing data (see 15.804-1(b)(4) and 15.804-2), the provisions and clauses prescribed in 15.804-8 and 15.106 for this purpose shall be inserted in an addendum to the solicitation and contract.
- (e) When a contract is priced using the exceptions at 15.804-1(a)(1), no cost or pricing data may be obtained for modifications unless the proposed modification would change the contract from a contract for a commercial item to a contract for other than a commercial item (see 15.804-1(b)(6)). If the exceptions at 15.804-1(a)(1) are not used, the contracting officer may be required to obtain cost or pricing data to determine the reasonableness of prices for subsequent modifications (see 15.804-2(a)(1)) and the contracting officer shall insert the provisions and clauses prescribed for this purpose in an addendum to the solicitation and contract.

12.210 Contract financing.

Customary market practice for some commercial items may include buyer contract financing. The contracting officer may offer Government financing in accordance with the policies and procedures in Part 32.

12.211 Technical data.

Except as provided by agency-specific statutes, the Government shall acquire only the technical data and the rights in that data customarily provided to the public with

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PART 12—ACQUISITION OF COMMERCIAL ITEMS

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a commercial item or process. The contracting officer shall presume that data delivered under a contract for commercial items was developed exclusively at private expense. When a contract for commercial items requires the delivery of technical data, the contracting officer shall include appropriate provisions and clauses delineating the rights in the technical data in addenda to the solicitation and contract (see Part 27 or agency FAR supplements).

12.212 Computer software.

- (a) Commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs. Generally, offerors and contractors shall not be required to—
 - (1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public; or
 - (2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except as mutually agreed to by the parties.
- (b) With regard to commercial computer software and commercial computer software documentation, the Government shall have only those rights specified in the license contained in any addendum to the contract.

12.213 Other customary commercial practices.

It is customary practice in the commercial marketplace for both the buyer and seller to propose terms and conditions for a given transaction, each written from their particular perspectives. The terms and conditions prescribed in this Part 12 seek to balance the interests of both the buyer and seller. These terms and conditions are generally appropriate for use in a wide range of acquisitions. However, market research may indicate other customary commercial practices that are appropriate for the acquisition of the particular item. These practices should be considered for incorporation into the solicitation and contract if the contracting officer determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or executive order.

SUBPART 12.3—SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERCIAL ITEMS

12.300 Scope of subpart.

This subpart establishes provisions and clauses to be used when acquiring commercial items.

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

- (a) In accordance with Section 8002 of Public Law 103-355 (41 U.S.C 264, note), contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses—
 - (1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or
 - (2) Determined to be consistent with customary commercial practice.
- (b) To implement this Act, the contracting officer shall insert the following provisions in solicitations for the acquisition of commercial items, and clauses in solicitations and contracts for the acquisition of commercial items:
 - (1) The provision at 52.212-1, Instructions to Offerors—Commercial Items. This provision provides a single, streamlined set of instructions to be used when soliciting offers for commercial items and is incorporated in the solicitation by reference (see Block 26, SF 1449). The contracting officer may tailor these instructions or provide additional instructions tailored to the specific acquisition in accordance with 12.302;
 - (2) The provision at 52.212-3, Offeror Representations and Certifications—Commercial Items. This provision provides a single, consolidated list of certifications and representations for the acquisition of commercial items and is attached to the solicitation for offerors to complete and return with their offer. This provision may not be tailored except in accordance with Subpart 1.4;
 - (3) The clause at 52.212-4, Contract Terms and Conditions Commercial Items. This clause includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices and is incorporated in the solicitation and contract by reference (see Block 26, SF 1449). The contracting officer may tailor this clause in accordance with 12.302; and
 - (4) The clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders - Commercial Items. This clause incorporates by reference only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.212-5(b) or (c) are applicable to the specific acquisition. When cost information is obtained pursuant to Part 15 to establish the reasonableness of prices for commercial items, the contracting officer shall insert the clauses prescribed for this purpose in an addendum to the solicitation and contract. This clause may not be tailored.

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- (c) When the use of evaluation factors is appropriate, the contracting officer may—
 - (1) Insert the provision at 52.212-2, Evaluation—Commercial Items, in solicitations for commercial items (see 12.602); or
 - (2) Include a similar provision containing all evaluation factors required by 13.106-1, Subpart 14.2 or Subpart 15.6, as an addendum (see 12.302(d)).
- (d) Use of required provisions and clauses. Notwithstanding prescriptions contained elsewhere in the FAR, when acquiring commercial items, contracting officers shall be required to use only those provisions and clauses prescribed in this part. The provisions and clauses prescribed in this part shall be revised, as necessary, to reflect the applicability of statutes and executive orders to the acquisition of commercial items.
- (e) Discretionary use of FAR provisions and clauses. The contracting officer may include in solicitations and contracts by addendum other FAR provisions and clauses when their use is consistent with the limitations contained in 12.302. For example:
 - (1) The contracting officer may include appropriate clauses when an indefinite-delivery type of contract will be used. The clauses prescribed at 16.505 may be used for this purpose.
 - (2) The contracting officer may include appropriate provisions and clauses when the use of options is in the Government's interest. The provisions and clauses prescribed in 17.208 may be used for this purpose. If the provision at 52.212-2 is used, paragraph (b) provides for the evaluation of options.
 - (3) The contracting officer may use the provisions and clauses contained in Part 23 regarding the use of recovered material when appropriate for the item being acquired.
- (f) Agencies may supplement the provisions and clauses prescribed in this part (to require use of additional provisions and clauses) only as necessary to reflect agency unique statutes applicable to the acquisition of commercial items or as may be approved by the agency senior procurement executive, or the individual responsible for representing the agency on the FAR Council, without power of delegation.

12.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(a) General. The provisions and clauses established in this subpart are intended to address, to the maximum extent practicable, customary commercial market practices for a wide range of potential Government acquisitions of commercial items. However, because of the broad range of commercial items acquired by the Government, variations in customary commercial practices across markets and the relative volume of the Government's acquisitions in the specific market, contracting officers may, within the limita-12-4

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tions of this subpart, and after conducting appropriate market research, tailor the provision at 52.212-1, Instructions to Offerors—Commercial Items, and the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, to adapt to the market conditions for each acquisition.

- (b) Tailoring 52.212-4, Contract Terms and Conditions—Commercial Items. The following paragraphs of the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, implement statutory requirements and shall not be tailored—
 - (1) Assignments;
 - (2) Disputes;
 - (3) Payment;
 - (4) Invoice;
 - (5) Other compliances; and
 - (6) Compliance with laws unique to Government contracts.
- (c) Tailoring inconsistent with customary commercial practice. The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures. The request for waiver must describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice and include a determination that use of the customary commercial practice is inconsistent with the needs of the Government. A waiver may be requested for an individual or class of contracts for that specific item.
- (d) Tailoring shall be by addenda to the solicitation and contract. The contracting officer shall indicate in Block 26 of the SF 1449 if addenda are attached. These addenda may include, for example, a continuation of the schedule of supplies/services to be acquired from blocks 18 through 21 of the SF 1449; a continuation of the description of the supplies/services being acquired; further elaboration of any other item(s) on the SF 1449; any other terms or conditions necessary for the performance of the proposed contract (such as options, ordering procedures for indefinite-delivery type contracts, warranties, contract financing arrangements, etc.).

12.303 Contract format.

Solicitations and contracts for the acquisition of commercial items prepared using this Part 12 shall be assembled, to the maximum extent practicable, using the following format:

- (a) Standard Form (SF) 1449;
- (b) Continuation of any block from SF 1449, such as-
- (1) Block 10 if set-aside for emerging small businesses:
 - (2) Block 18B for remittance address;
 - (3) Block 19 for contract line item numbers;

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- 20 for schooling of supplies (complete) or
- (4) Block 20 for schedule of supplies/services; or
- (5) Block 25 for accounting data;
- (c) Contract clauses-
- (1) 52.212-4, Contract Terms and Conditions—Commercial Items, by reference (see SF 1449 block 26);
 - (2) Any addendum to 52.212-4; and
- (3) 52.212-5, Contract Terms and Conditions Required to Implement Statutes and Executive orders;
- (d) Any contract documents, exhibits or attachments; and
 - (e) Solicitation provisions-
 - (1) 52.212-1, Instructions to Offerors—Commercial Items, by reference (see SF 1449, Block 26);
 - (2) Any addendum to 52.212-1;
 - (3) 52.212-2, Evaluation—Commercial Items, or other description of evaluation factors for award, if used; and
 - (4) 52.212-3, Offeror Representations and Certifications—Commercial Items.

SUBPART 12.4—UNIQUE REQUIREMENTS REGARDING TERMS AND CONDITIONS FOR COMMERCIAL ITEMS

12.401 General.

This subpart provides-

- (a) Guidance regarding tailoring of the paragraphs in the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, when the paragraphs do not reflect the customary practice for a particular market; and
- (b) Guidance on the administration of contracts for commercial items in those areas where the terms and conditions in 52.212-4 differ substantially from those contained elsewhere in the FAR.

12.402 Acceptance.

- (a) The acceptance paragraph in 52.212-4 is based upon the assumption that the Government will rely on the contractor's assurances that the commercial item tendered for acceptance conforms to the contract requirements. The Government inspection of commercial items will not prejudice its other rights under the acceptance paragraph. Additionally, although the paragraph does not address the issue of rejection, the Government always has the right to refuse acceptance of nonconforming items. This paragraph is generally appropriate when the Government is acquiring noncomplex commercial items.
- (b) Other acceptance procedures may be more appropriate for the acquisition of complex commercial items or commercial items used in critical applications. In such cases, the contracting officer shall include alternative inspection procedure(s) in an addendum and ensure these procedures and the postaward remedies adequately protect the interests of the Government. The contracting officer must carefully examine the terms and conditions of any

express warranty with regard to the effect it may have on the Government's available postaward remedies (see 12.404).

(c) The acquisition of commercial items under other circumstances such as on an "as is" basis may also require acceptance procedures different from those contained in 52.212-4. The contracting officer should consider the effect the specific circumstances will have on the acceptance paragraph as well as other paragraphs of the clause.

12.403 Termination.

- (a) General. The clause at 52.212-4 permits the Government to terminate a contract for commercial items either for the convenience of the Government or for cause. However, the paragraphs in 52.212-4 entitled "Termination for the Government's Convenience" and "Termination for Cause" contain concepts which differ from those contained in the termination clauses prescribed in Part 49. Consequently, the requirements of Part 49 do not apply when terminating contracts for commercial items and contracting officers shall follow the procedures in this section. Contracting officers may continue to use Part 49 as guidance to the extent that Part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4.
- (b) *Policy*. The contracting officer should exercise the Government's right to terminate a contract for commercial items either for convenience or for cause only when such a termination would be in the best interests of the Government. The contracting officer should consult with counsel prior to terminating for cause.
- (c) Termination for cause. (1) The paragraph in 52.212-4 entitled "Excusable Delay" requires contractors notify the contracting officer as soon as possible after commencement of any excusable delay. In most situations, this requirement should eliminate the need for a show cause notice prior to terminating a contract. The contracting officer shall send a cure notice prior to terminating a contract for a reason other than late delivery.
 - (2) The Government's rights after a termination for cause shall include all the remedies available to any buyer in the marketplace. The Government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess reprocurement costs together with any incidental or consequential damages incurred because of the termination.
 - (3) When a termination for cause is appropriate, the contracting officer shall send the contractor a written notification regarding the termination. At a minimum, this notification shall—
 - (i) Indicate the contract is terminated for cause;
 - (ii) Specify the reasons for the termination;
 - (iii) Indicate which remedies the Government intends to seek or provide a date by which the

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Government will inform the contractor of the remedy; and

- (iv) State that the notice constitutes a final decision of the contracting officer and that the contractor has the right to appeal under the Disputes clause (see 33.211).
- (d) Termination for the Government's convenience. (1) When the contracting officer terminates a contract for commercial items for the Government's convenience, the contractor shall be paid—
 - (i) The percentage of the contract price reflecting the percentage of the work performed prior to the notice of the termination, and
 - (ii) Any charges the contractor can demonstrate directly resulted from the termination. The contractor may demonstrate such charges using its standard record keeping system and is not required to comply with the cost accounting standards or the contract cost principles in Part 31. The Government does not have any right to audit the contractor's records solely because of the termination for convenience.
 - (2) Generally, the parties should mutually agree upon the requirements of the termination proposal. The parties must balance the Government's need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement.

12.404 Warranties.

- (a) Implied warranties. The Government's post award rights contained in 52.212-4 are the implied warranty of merchantability, the implied warranty of fitness for particular purpose and the remedies contained in the acceptance paragraph.
 - (1) The implied warranty of merchantability provides that an item is reasonably fit for the ordinary purposes for which such items are used. The items must be of at least average, fair or medium-grade quality and must be comparable in quality to those that will pass without objection in the trade or market for items of the same description.
 - (2) The implied warranty of fitness for a particular purpose provides that an item is fit for use for the particular purpose for which the Government will use the items. The Government can rely upon an implied warranty of fitness for particular purpose when—
 - (i) The seller knows the particular purpose for which the Government intends to use the item; and
 - (ii) The Government relied upon the contractor's skill and judgment that the item would be appropriate for that particular purpose.
 - (3) Contracting officers should consult with legal counsel prior to asserting any claim for a breach of an implied warranty.
- (b) Express warranties. The Federal Acquisition 12-6

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Streamlining Act of 1994 (41 U.S.C. 264 note) requires contracting officers to take advantage of commercial warranties. To the maximum extent practicable, solicitations for commercial items shall require offerors to offer the Government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice. Solicitations may specify minimum warranty terms, such as minimum duration, appropriate for the Government's intended use of the item.

- (1) Any express warranty the Government intends to rely upon must meet the needs of the Government. The contracting officer should analyze any commercial warranty to determine if—
 - (i) The warranty is adequate to protect the needs of the Government, e.g., items covered by the warranty and length of warranty;
 - (ii) The terms allow the Government effective postaward administration of the warranty to include the identification of warranted items, procedures for the return of warranted items to the contractor for repair or replacement, and collection of product performance information; and
 - (iii) The warranty is cost-effective.
- (2) In some markets, it may be customary commercial practice for contractors to exclude or limit the implied warranties contained in 52.212-4 in the provisions of an express warranty. In such cases, the contracting officer shall ensure that the express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance.
- (3) Express warranties shall be included in the contract by addendum (see 12.302).

SUBPART 12.5—APPLICABILITY OF CERTAIN LAWS TO THE ACQUISITION OF COMMERCIAL ITEMS

12.500 Scope of subpart.

As required by Section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. 430), this subpart lists provisions of laws that are not applicable to contracts for the acquisition of commercial items, or are not applicable to subcontracts, at any tier, for the acquisition of a commercial item. This subpart also lists provisions of law that have been amended to eliminate or modify their applicability to either contracts or subcontracts for the acquisition of commercial items.

12.501 Applicability.

- (a) This subpart applies to any contract or subcontract at any tier for the acquisition of commercial items.
- (b) Nothing in this subpart shall be construed to authorize the waiver of any provision of law with respect to any subcontract if the prime contractor is reselling or distribut-

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ing commercial items of another contractor without adding value. This limitation is intended to preclude establishment of unusual contractual arrangements solely for the purpose of Government sales.

(c) For purposes of this subpart, contractors awarded subcontracts under Subpart 19.8, Contracting with the Small Business Administration (the 8(a) Program), shall be considered prime contractors.

12.502 Procedures.

- (a) The FAR prescription for the provision or clause for each of the laws listed in 12.503 has been revised in the appropriate part to reflect its proper application to prime contracts for the acquisition of commercial items.
- (b) For subcontracts for the acquisition of commercial items or commercial components, the clauses at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, and 52.244-6, Subcontracts for Commercial Items and Commercial Components, reflect the applicability of the laws listed in 12.504 by identifying the only provisions and clauses that are required to be included in a subcontract at any tier for the acquisition of commercial items or commercial components.

12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.

- (a) The following laws are not applicable to executive agency contracts for the acquisition of commercial items:
 - (1) 41 U.S.C. 43, Walsh-Healey Act (see Subpart 22.6).
 - (2) 41 U.S.C. 254(a) and 10 U.S.C. 2306(b), Contingent Fees (see 3.404).
 - (3) 41 U.S.C. 416(a)(6), Minimum Response Time for Offers under Office of Federal Procurement Policy Act (see 5.203).
 - (4) 41 U.S.C. 701, *et seq.*, Drug-Free Workplace Act of 1988 (see 23.501).
- (b) Certain requirements of the following laws have been eliminated for executive agency contracts for the acquisition of commercial items:
 - (1) 33 U.S.C. 1368, Requirement for a certificate and clause under the Federal Water Pollution Control Act (see 23.105).
 - (2) 40 U.S.C. 327 et seq., Requirement for a certificate and clause under the Contract Work Hours and Safety Standards Act (see 22.305).
 - (3) 41 U.S.C. 57(a) and (b), and 58, Requirement for a clause and certain other requirements related to the Anti-Kickback Act of 1986 (see 3.502).
 - (4) 41 U.S.C. 423(e)(1)(B), Requirement for a certain certification under the Procurement Integrity Act (see 3.104-9).
 - (5) 42 U.S.C. 7606, Requirements for a certificate and clause under the Clean Air Act (see 23.105).

- (6) 49 U.S.C. 40118, Requirement for a certificate and clause under the Fly American provisions (see 47.405).
- (c) The applicability of the following laws have been modified in regards to Executive agency contracts for the acquisition of commercial items:
 - (1) 41 U.S.C. 253g and 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see 3.503).
 - (2) 41 U.S.C. 254(d) and 10 U.S.C. 2306a, Truth in Negotiations Act (see 15.804).
 - (3) 41 U.S.C. 422, Cost Accounting Standards (see 48 CFR chapter 99).

12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

- (a) The following laws are not applicable to subcontracts at any tier for the acquisition of commercial items or commercial components at any tier:
 - (1) 15 U.S.C. 644(d), Requirements relative to labor surplus areas under the Small Business Act (see Subpart 19.2).
 - (2) 19 U.S.C. 1202, Tariff Act of 1930 (see Subpart 25.6).
 - (3) 19 U.S.C. 1309, Supplies for Certain Vessels and Aircraft (see Subpart 25.6).
 - (4) 19 U.S.C. 2701, et seq., Authority to Grant Duty Free Treatment (see Subpart 25.6).
 - (5) 31 U.S.C. 1352, Limitation on Payments to Influence Certain Federal Transactions (see Subpart 3.8).
 - (6) 41 U.S.C. 43, Walsh-Healey Act (see Subpart 22.6).
 - (7) 41 U.S.C. 253d, Validation of Proprietary Data Restrictions (see Subpart 27.4).
 - (8) 41 U.S.C. 254(a) and 10 U.S.C. 2306(b), Contingent Fees (see Subpart 3.4).
 - (9) 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, when a subcontractor is not required to provide cost or pricing data (see Subpart 15.1).
 - (10) 41 U.S.C. 351, Service Contract Act of 1965, as amended (see Subpart 22.10).
 - (11) 41 U.S.C. 416(a)(6), Minimum Response Time for Offers under Office of Federal Procurement Policy Act (see Subpart 5.2).
 - (12) 41 U.S.C. 418a, Rights in Technical Data (see Subpart 27.4).
 - (13) 41 U.S.C. 701, et seq., Drug-Free Workplace Act of 1988 (see Subpart 23.5).
 - (14) 46 U.S.C. 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (see Subpart 47.5)(inapplicability effective May 1, 1996).
 - (15) 49 U.S.C. 40118, Fly American provisions (see Subpart 47.4).

12.601

- FEDERAL ACQUISITION REGULATION (FAR)
- (16) Pub. L. 90-469, William Langer Jewel Bearing Plant Special Act (see Subpart 8.2).
- (b) Certain requirements of the following laws have been eliminated for subcontracts at any tier for the acquisition of commercial items or commercial components:
 - (1) 33 U.S.C. 1368, Requirement for a certificate and clause under the Federal Water Pollution Control Act (see Subpart 23.1).
 - (2) 40 U.S.C. 327, et seq., Requirement for a certificate and clause under the Contract Work Hours and Safety Standards Act (see Subpart 22.3).
 - (3) 41 U.S.C. 423(e)(1)(B), Requirement for certain certifications under the Procurement Integrity Act (see Subpart 3.1).
 - (4) 42 U.S.C. 7606, Requirements for a certificate and clause under the Clean Air Act (see Subpart 23.1).
- (c) The applicability of the following laws has been modified in regards to subcontracts at any tier for the acquisition of commercial items or commercial components:
 - (1) 41 U.S.C. 253g and 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see Subpart 3.5).
 - (2) 41 U.S.C. 254(d) and 10 U.S.C. 2306a, Truth in Negotiations Act (see Subpart 15.8).
 - (3) 41 U.S.C. 422, Cost Accounting Standards (see 48 CFR chapter 99).

SUBPART 12.6—STREAMLINED PROCEDURES FOR EVALUATION AND SOLICITATION FOR COMMERCIAL ITEMS

12.601 General.

This subpart provides optional procedures for (a) streamlined evaluation of offers for commercial items; and (b) streamlined solicitation of offers for commercial items for use where appropriate. These procedures are intended to simplify the process of preparing and issuing solicitations, and evaluating offers for commercial items consistent with customary commercial practices.

12.602 Streamlined evaluation of offers.

(a) When evaluation factors are used, the contracting officer may insert a provision substantially the same as the provision at 52.212-2, Evaluation—Commercial Items, in solicitations for commercial items or comply with the procedures in 13.106-1 if the acquisition is being made using the procedures in Part 13. When the provision at 52.212-2 is used, paragraph (a) of the provision shall be tailored to the specific acquisition to describe the evaluation factors and relative importance of those factors. This provision contemplates an approach designed to select the source whose offer will provide the Government with the greatest value in terms of performance and other factors. Other methods of evaluation and basis for award may be more appropriate for a given acquisition.

- (b) Offers shall be evaluated in accordance with the criteria contained in the solicitation. For many commercial items, the criteria need not be more detailed than technical (capability of the item offered to meet the agency need), price and past performance. Technical capability may be evaluated by how well the proposed products meet the Government requirement instead of predetermined subfactors. Solicitations for commercial items do not have to contain subfactors for technical capability when the solicitation adequately describes the item's intended use. A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features and warranty provisions. Past performance shall be evaluated in accordance with the procedures in 13.106-1 or Subpart 15.6, as applicable. The contracting officer shall ensure the instructions provided in the provision at 52.212-1, Instructions to Offerors— Commercial Items, and the evaluation criteria provided in the provision at 52.212-2, Evaluation— Commercial Items, are in agreement.
- (c) Select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered.

12.603 Streamlined solicitation for commercial items.

- (a) When a written solicitation will be issued, the contracting officer may use the following procedure to reduce the time required to solicit and award contracts for the acquisition of commercial items. This procedure combines the Commerce Business Daily (CBD) synopsis required by 5.203 and the issuance of the solicitation into a single document with the following limitations:
 - (1) Section 5.207 limits submissions to the CBD to 12,000 textual characters (approximately 3 1/2 single-spaced pages).
 - (2) This combined CBD synopsis/solicitation is only appropriate where the solicitation is relatively simple and is not recommended for use when lengthy addenda to the solicitation are necessary.
- (b) When using the combined synopsis/solicitation procedure, the SF 1449 is not used for issuing the solicitation.
- (c) To use these procedures, the contracting officer shall—
 - (1) Prepare the synopsis as described at 5.207 for items 1-16.
 - (2) In item 17, Description, include the following additional information:
 - (i) The following statement:

This is a combined synopsis/solicitation for commercial items prepared in accordance with the format in Subpart 12.6, as supplemented with additional information included in this notice. This announcement constitutes the only solicitation; proposals are being requested and a written solicitation will not be issued.

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PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.603

- (ii) The solicitation number and a statement that the solicitation is issued as an invitation to bid (IFB), request for quotation (RFQ) or request for proposal (RFP).
- (iii) A statement that the solicitation document and incorporated provisions and clauses are those in effect through Federal Acquisition Circular _____.
- (iv) A notice regarding any set-aside and the associated standard industrial classification code and small business size standard. Also include a statement regarding the Small Business Competitiveness Demonstration Program, if applicable.
- (v) A list of contract line item number(s) and items, quantities and units of measure, (including option(s), if applicable).
- (vi) Description of requirements for the items to be acquired.
- (vii) Date(s) and place(s) of delivery and acceptance and FOB point.
- (viii) A statement that the provision at 52.212-1, Instructions to Offerors—Commercial, applies to this acquisition and a statement regarding any addenda to the provision.
- (ix) A statement regarding the applicability of the provision at 52.212-2, Evaluation—Commercial Items, if used, and the specific evaluation criteria to be included in paragraph (a) of that provision. If this provision is not used, describe the evaluation procedures to be used.
- (x) A statement advising offerors to include a completed copy of the provision at 52.212-3, Offeror Representations and Certifications—Commercial Items, with its offer.
- (xi) A statement that the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, applies to this acquisition and a statement regarding any addenda to the clause.

- (xii) A statement that the clause at 52.212-5, Contract Terms and Conditions Required To Implement Statutes Or Executive Orders—Commercial Items, applies to this acquisition and a statement regarding which, if any, of the additional FAR clauses cited in the clause are applicable to the acquisition.
- (xiii) A statement regarding any additional contract requirement(s) or terms and conditions (such as contract financing arrangements, warranty requirements or GSA Delegation of Procurement Authority (DPA) case number (see 48 CFR 201-39.106-4)) determined by the contracting officer to be necessary for this acquisition and consistent with customary commercial practices.
- (xiv) A statement regarding the Defense Priorities and Allocations System (DPAS) and assigned rating, if applicable.
- (xv) A statement regarding any applicable Commerce Business Daily numbered notes.
 - (xvi) The date, time and place offers are due.
- (xvii) The name and telephone number of the individual to contact for information regarding the solicitation.
- (3) Allow response time for receipt of offers as follows:
 - (i) Because the CBD synopsis and solicitation are contained in a single document, it is not necessary to publish a separate CBD synopsis 15 days before the issuance of the solicitation.
 - (ii) When using the combined CBD synopsis/solicitation, contracting officers shall establish a response time in accordance with 5.203(b), but shall allow at least 15 days response time from the date the notice is published in the CBD.
- (4) Publish amendments to solicitations in the same manner as the initial synopsis/solicitation.

Section K Solicitation Preparation – Using the Combined Synopsis/Solicitation

Informal Lecture and View-graphs

(30 minutes)

Learning Objective: Knowledge sufficient to prepare a successful invitation for bids for acquiring a commercial item.

The solicitation in Section K is based on the Market Research report found in Exhibit B-1. This report is to support the acquisition of a security system for the Desert Shield/Desert Storm Museum.

SELECT THE FORMAT FOR THE SOLICITATION

Review choice of SF1449 or combined synopsis/solicitation

Viewgraph K-1

- 1. For the purposes of this exercise we'll be using the combined synopsis/solicitation because it is well suited to sealed bidding. You can see the entire solicitation in your book. We'll be acquiring the following hardware for the Desert Shield/Storm Museum security system:
 - A walk-through personnel metal detection system to be installed at the main entrance to the museum.
 - An uninterruptable power supply or other electrical backup system to support the metal detection system at full capacity for at least two hours.
- 1. P!!
- 2. 0513!!
- 3. 96!!
- 4. 2015!!
- 5. 22202-9999!!
- 6. 63!!

- 7. USN Space & Naval Warfare Systems Command (SPAWAR), 2511 Jefferson Davis Highway, Arlington, VA 22202-9999!!
- 8. 63 Alarm, Signal, and Security Detection Systems!!
- 9. IFBSPA-96-B-0027!!
- 10. 062896!!
- 11. Contact, Mary Drake. 703/602-6091/Contracting Officer, Larry Bird, 703/602-6094!!
- 12. N/A!!
- 13. N/A!!
- 14. N/A!!
- 15. N/A!!
- 16. N/A!!
- 17(i). This is a combined synopsis/sealed bid solicitation for commercial items prepared in accordance with the format in FAR Subpart 12.6 and FAR 14, as supplemented with additional information included in this notice. This announcement constitutes the only solicitation; bids are being requested and a written solicitation will not be issued.!!
- 17(ii). Solicitation#IFBSPA-96-B-0027!!
- 17(iii). This solicitation document and incorporated provisions and clauses are those in effect through Federal Acquisition Circular 90-37.!!
- 17(iv). This is a full and open procurement under SIC 7382, Security System Services.!!
- 17(v). There are four contract line items, two of which are optional: CLIN 0001, Walk-Through Personnel Metal Detection System, quantity one (1); CLIN 0002, Uninterruptable power supply or other electrical backup system to support the system provided in CLIN 0001 at full capacity for at least two hours, quantity one (1); CLIN 0003 (Optional), Extended Warranty for CLIN 0001; and CLIN 0004 (Optional), Extended Warranty for CLIN 0002.!!

17(vi). Description: (1) **Background**: The Desert Shield/Desert Storm Museum commemorates the women and men who served in the Persian Gulf on behalf of our country during the Desert Shield/Storm Operation. The museum houses many artifacts of war and gifts of appreciation from the Saudi Arabia and Kuwait governments. Upgraded security measures require installation of a personnel metal detection equipment. (2) General **Requirements**: A walk-through personnel metal detection system to be installed at the main entrance to the m Museum. An uninterruptable power supply or other electrical backup system will be required to support the metal detection system at full capacity for at least two hours. (3) **Specific Criteria.** (1) Walk-Through Personnel Metal Detection System will feature LED indicators for power and alarm; a minimum 12-digit keypad, hermetically sealed to resist dust and moisture; DB-15 Connector to be provided within computer console; Form C relay contacts and power supply voltages for auxiliary external alarm interfacing; RS-232 C data output port required; switchable power supply between 110 and 220 volts + 10% 50/60 HZ, 1.2 amps maximum draw required; humidity tolerance to 95% non-condensing required; throughput rate to be at least 50-60 detection's per minute minimum; operating temperature is 10 C to +55 C; fault indicators shall consistently monitor each electronic system and announce any major failure; uniformity of the multi-field antenna must be equal in any position; sensor detection shall be bi-directional; and noise rejection to eliminate all radio frequency interference from portable 2way, mobile and base radios. Archway structure shall be gray Formica Plastic Laminate. Optional features to include one remote command center with 25' standard cable, one remote Annunciator Panel with 25" standard cable and one weatherized archway portal. Standard warranty of 24 months is required on all parts and labor. (2) Contractor shall propose extended warranty and additional training as optional items for a two-year time frame. Extended warranties to include 100% coverage of the installed system, 24-hour technical and emergency assistance (including weekends and holidays), 48-hour replacement parts (on most system components), 4 hours of training yearly on the installed system (excluding training at the time of installation), and 3-yearly preventive maintenance checks (cleaning and tuning every 4-months), and one camera. (3) **Schedule**: Installation is to be completed no later than September 30 1996..!!

17(vii). Date of delivery is September 30, 1996; Place of Delivery and Acceptance is 110 Pennsylvania Avenue, NE, Washington, DC; FOB: destination.!!

17(viii). Solicitation provision at FAR 52.212-1, Instructions to Offerors — Commercial Items (OCT 1995) is hereby incorporated by reference.!!

17(ix). The Government will evaluate bids in response to the solicitation without discussion and will award a contract to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the government considering only price.!!

17(x). Offeror's are reminded to include a completed copy of the provision at 52.212-3, Offeror Representations and Certifications — Commercial Items, with its offer.!!

17(xi). Clause 52-212-4, Contract Terms and Conditions—Commercial Items (OCT 1995), is hereby incorporated by reference.!!

17(xii). Clause 52.212-5, Contract Terms and Conditions Required to Implement Statutes Or Executive Orders — Commercial Items, is hereby incorporated by reference. The following paragraphs apply to this solicitation and any resultant contract (b)(2) 52.203-10, (b)(3) 52.219-8, (b)(6) 52.222-26, (b)(7) 52.222-35, (b)(8) 52.222-36, (b)(9) 52.222-37, (b)(15) 52.225-21,.!!

17(xiii). Additional Contract Terms and Conditions applicable to this procurement are: (i) Hardware warranties become effective three days after successful systems installation and test. (ii) *Type of Contract:* A firm fixed-price contract will be awarded. (iii) *Period of Performance:* Date of contract award through September 30, 1996, excluding warranties as stipulated above.!!

17(xiv). The Defense Priorities and Allocations Systems (DPAS) assigned rating for this procurement is unrated.!!

17(xv). N/A!!

17(xvi). Signed and dated offers (one original/two copies) must be submitted to US Department of the Navy, Space & Naval Warfare Systems Command (SPAWAR), 2511 Jefferson Davis Highway, Arlington, VA 22202-9999, ATTN: Mary Drake, Room 426. at or before Noon (EST) on June 28, 1996.!!

17(xvii). Contact Mary Drake at 703/602-6091.!! *****

ESTABLISH DATES AND TIMES FOR RECEIPT OF PROPOSALS

Solicitations for commercial items are no longer required to remain open for 30 days.

Viewgraph K-2

2. Establish opening dates and times.

Solicitations for commercial items are no longer required to remain open for 30 days (FAR 5.203(b)). The contracting officer should consider the circumstances of the particular acquisition (including customary commercial practice, of course) and establish a response time that will allow a reasonable opportunity to respond. In our example, we'll use 30 days.

TAILORING THE INSTRUCTIONS TO OFFERORS

Solicitation Provision at FAR 52.212-1 Instructions to Offerors— Commercial items

Viewgraph K-4

4. Tailoring the Solicitation Provision at FAR 52.212-1

Part 12 allows contracting officers to tailor the provision at FAR 52.212-1, Instructions to Offerors – Commercial Items. Because this is sealed bidding, offerors are provided the award criteria in the solicitation. If this were an SF 1449 solicitation, this would be included in an addendum. However, you'll find the information in 17(ix) of the combined synopsis/solicitation in your book.

STATUTORY TERMS AND CONDITIONS

Clause at FAR 52.212-5
Terms and Conditions Necessary to
Implement Statutes

5. Terms and Conditions Necessary to Implement Statutes

Contracting officers should use the prescriptions that appear in the appropriate parts of the FAR to indicate which statutory representations and certifications or contract clauses are applicable to the acquisition. In the case of a combined synopsis/solicitation, use of FACNET or other electronic contracting methods, only the applicable sections need to be cited. The entire provision or clause need not be published or transmitted. These requirements can be seen in items 17(x) and 17(xii) of the combined synopsis/solicitation.

CONTRACT CLAUSE LIMITATION

- Necessary to implement statutes or executive orders
- Consistent with standard commercial practice
- Standard Part 12 provisions and clauses

Viewgraph K-6

6. Contract Clause Limitation.

Remember there is a statutory limitation on the types of clauses that may be included in a contract for commercial items. They must be:

- a. Necessary to implement statutes or executive orders which was taken care of through the provision at FAR 52.212-3 and the clause at FAR 52.212-5, and
- b. Consistent with standard commercial practice. This requirement is implemented through use of the standard Part 12 provisions and clauses, and the inclusion of any additional provision or clause that market research indicates is customary commercial practice. Such provisions or clauses would be included by an addendum to the SF 1449, or in item 17(xiii) of the combined synopsis/solicitation.

Section L Commercial Item Financing

Informal lecture and Viewgraphs

(30 minutes)

Learning Objective: An understanding of the appropriate contract financing techniques for commercial items contracts.

COMMERCIAL ITEM FINANCING

- Advance payments
- Interim payments
- CO specified
- Offeror proposed
- Installment payments

Viewgraph L-1

We're going to briefly go over the types of contract financing available for commercial items contracts. The Government requires adequate security for all commercial item financing payments (see FAR 32.202-4).

1. Commercial Advance Payments

Advance payments can be made if market research indicates that such payments are customary in the commercial marketplace. Advance payments are limited to 15 percent of the contract price.

2. <u>Contracting Officer Specified</u>

The contracting officer may specify in the solicitation the contract financing terms that will be provided by the government. These terms should be based on a market research finding that contract financing terms are generally standard within an industry. When the contracting officer specifies the form of contract financing there is no need to evaluate the cost of financing during source selection.

3. Offeror Proposed Financing

This form of contract financing is far more complex to evaluate when making a source selection. However, when market research indicates that the terms of financing are extremely varied within a market, offeror proposed financing may be appropriate. The provision at FAR 52.232-31, Invitation to Propose Financing

Terms, is included in the solicitation when offeror proposed financing is used. Because this method permits financing terms to vary for each offer, the government must adjust each proposed price to reflect the cost to the government of contract financing in accordance with the proposed terms. The imputed cost of the government's borrowing must be added to each offeror's price.

4. <u>Installment Payments</u>

Installment payments are a series of fixed equal interim financing payments made prior to delivery or acceptance of commercial items. This type of financing should also be used when market research indicates such payments are consistent with commercial practice. The clause at 52.232-30, Installment Payments for Commercial Items, is used to provide for installment payments. **Progress Payments may not be used for commercial items**.

SUBPART 32.2—COMMERCIAL ITEM PURCHASE FINANCING

32.200 Scope of subpart.

This subpart provides policies and procedures for commercial financing arrangements under commercial purchases pursuant to Part 12.

32.201 Statutory authority.

10 U.S.C. 2307(f) and 41 U.S.C. 255(f) provide that payment for commercial items may be made under such terms and conditions as the head of the agency determines are appropriate or customary in the commercial market-place and are in the best interest of the United States.

32.202 General.

32.202-1 Policy.

- (a) Use of financing in contracts. It is the responsibility of the contractor to provide all resources needed for performance of the contract. Thus, for purchases of commercial items, financing of the contract is normally the contractor's responsibility. However, in some markets the provision of financing by the buyer is a commercial practice. In these circumstances, the contracting officer may include appropriate financing terms in contracts for commercial purchases when doing so will be in the best interest of the Government.
- (b) Authorization. Commercial interim payments and commercial advance payments may be made under the following circumstances—
 - (1) The contract item financed is a commercial supply or service;
 - (2) The contract price exceeds the simplified acquisition threshold in Part 13;

PART 32—CONTRACT FINANCING

32.202-4

- (3) The contracting officer determines that it is appropriate or customary in the commercial marketplace to make financing payments for the item;
- (4) Authorizing this form of contract financing is in the best interest of the Government (see paragraph (e) of this subsection);
 - (5) Adequate security is obtained (see 32.202-4);
- (6) Prior to any performance of work under the contract, the aggregate of commercial advance payments shall not exceed 15 percent of the contract price;
- (7) The contract is awarded on the basis of competitive procedures or, if only one offer is solicited, adequate consideration is obtained (based on the time value of the additional financing to be provided) if the financing is expected to be substantially more advantageous to the offeror than the offeror's normal method of customer financing; and
- (8) The contracting officer obtains concurrence from the payment office concerning liquidation provisions when required by 32.206(e).
- (c) Difference from non-commercial financing. Government financing of commercial purchases under this subpart is expected to be different from that used for non-commercial purchases under Subpart 32.1 and its related subparts. While the contracting officer may adapt techniques and procedures from the non-commercial subparts for use in implementing commercial contract financing arrangements, the contracting officer must have a full understanding of effects of the differing contract environments and of what is needed to protect the interests of the Government in commercial contract financing.
- (d) Unusual contract financing. Any contract financing arrangement not in accord with the requirements of agency regulations or this part is unusual contract financing and requires advance approval in accordance with agency procedures. If not otherwise specified, such unusual contract financing shall be approved by the head of the contracting activity.
- (e) Best interest of the Government. The statutes cited in 32.201 do not allow contract financing by the Government unless it is in the best interest of the United States. Agencies may establish standards to determine whether contract financing is in the best interest of the Government. These standards may be for certain types of procurements, certain types of items, or certain dollar levels of procurements.

32.202-2 Types of payments for commercial item purchases.

These definitions incorporate the requirements of the statutory commercial financing authority and the implementation of the Prompt Payment Act.

"Commercial advance payment" means a payment made before any performance of work under the contract. The aggregate of these payments shall not exceed 15 percent of the contract price. These payments are contract financing payments for prompt payment purposes (i.e., not subject to the interest penalty provisions of the Prompt Payment Act in accordance with Subpart 32.9). These payments are not subject to Subpart 32.4, Advance Payments for Non-Commercial Items.

"Commercial interim payment" means any payment that is not a commercial advance payment or a delivery payment. These payments are contract financing payments for prompt payment purposes (i.e., not subject to the interest penalty provisions of the Prompt Payment Act in accordance with Subpart 32.9). A commercial interim payment is given to the contractor after some work has been done, whereas a commercial advance payment is given to the contractor when no work has been done.

"Delivery payment" means a payment for accepted supplies or services, including payments for accepted partial deliveries. Commercial financing payments are liquidated by deduction from these payments. Delivery payments are invoice payments for prompt payment purposes.

32.202-3 Conducting market research about financing terms.

Contract financing may be a subject included in the market research conducted in accordance with Part 10. If market research for contract financing is conducted, the contracting officer should consider—

- (a) The extent to which other buyers provide contract financing for purchases in that market;
 - (b) The overall level of financing normally provided;
- (c) The amount or percentages of any payments equivalent to commercial advance payments (see 32.202-2);
- (d) The basis for any payments equivalent to commercial interim payments (see 32.202-2), as well as the frequency, and amounts or percentages; and
- (e) Methods of liquidation of contract financing payments and any special or unusual payment terms applicable to delivery payments (see 32.202-2).

32.202-4 Security for Government financing.

- (a) Policy. (1) 10 U.S.C. 2307(f) and 41 U.S.C. 255(f) require the Government to obtain adequate security for Government financing. The contracting officer shall specify in the solicitation the type of security the Government will accept. If the Government is willing to accept more than one form of security, the offeror shall be required to specify the form of security it will provide. If acceptable to the contracting officer, the resulting contract shall specify the security (see 32.206(b)(1)(iv)).
 - (2) Subject to agency regulations, the contracting officer may determine the offeror's financial condition to be adequate security, provided the offeror agrees to provide additional security should that financial condition become inadequate as security (see paragraph (c) of the clause at 52.232-29, Terms for Financing of

32.203

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FEDERAL ACQUISITION REGULATION (FAR)

Purchases of Commercial Items). Assessment of the contractor's financial condition shall consider both net worth and liquidity. If the contracting officer finds the offeror's financial condition is not adequate security, the contracting officer shall require other adequate security. Paragraphs (b), (c), and (d) of this subsection list other (but not all) forms of security that the contracting officer may find acceptable.

- (3) The value of the security must be at least equal to the maximum unliquidated amount of contract financing payments to be made to the contractor. The value of security may be adjusted periodically during contract performance, as long as it is always equal to or greater than the amount of unliquidated financing.
- (b) Paramount lien. (1) The statutes cited in 32.201 provide that if the Government's security is in the form of a lien, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.
 - (2) When the Government's security is in the form of a lien, the contract shall specify what the lien is upon, e.g., the work in process, the contractor's plant, or the contractor's inventory. Contracting officers may be flexible in the choice of assets. The contract must also give the Government a right to verify the existence and value of the assets.
 - (3) Provision of Government financing shall be conditioned upon a contractor certification that the assets subject to the lien are free from any prior encumbrances. Prior liens may result from such things as capital equipment loans, installment purchases, working capital loans, various lines of credit, and revolving credit arrangements.
- (c) Other assets as security. Contracting officers may consider the guidance at 28.203-2, 28.203-3, and 28.204 in determining which types of assets may be acceptable as security. For the purpose of applying the guidance in Part 28 to this subsection, the term "surety" and/or "individual surety" should be interpreted to mean "offeror" and/or "contractor."
- (d) Other forms of security. Other acceptable forms of security include—
 - (1) An irrevocable letter of credit from a federally insured financial institution;
 - (2) A bond from a surety, acceptable in accordance with Part 28 (note that the bond must guarantee repayment of the unliquidated contract financing);
 - (3) A guarantee of repayment from a person or corporation of demonstrated liquid net worth, connected by significant ownership to the contractor; or
 - (4) Title to identified contractor assets of adequate worth.
- (e) Management of risk and security. In establishing contract financing terms, the contracting officer must be aware of certain risks. For example, very high amounts of 32-8

financing early in the contract (front-end loading) may unduly increase the risk to the Government. The security and the amounts and timing of financing payments must be analyzed as a whole to determine whether the arrangement will be in the best interest of the Government.

32.203 Determining contract financing terms.

When the criteria in 32.202-1(b) are met, the contracting officer may either specify the financing terms in the solicitation (see 32.204) or permit each offeror to propose its own customary financing terms (see 32.205). When the contracting officer has sufficient information on financing terms that are customary in the commercial marketplace for the item, those terms may be specified in the solicitation.

32.204 Procedures for contracting officer-specified commercial contract financing.

The financing terms shall be included in the solicitation. Contract financing shall not be a factor in the evaluation of resulting proposals, and proposals of alternative financing terms shall not be accepted (but see 14.208 and 15.606 concerning amendments of solicitations). However, an offer stating that the contracting officer-specified contract financing terms will not be used by the offeror does not alter the evaluation of the offer, nor does it render the offer nonresponsive or otherwise unacceptable. In the event of award to an offeror who declined the proposed contract financing, the contract financing provisions shall not be included in the resulting contract. Contract financing shall not be a basis for adjusting offerors' proposed prices, because the effect of contract financing is reflected in each offeror's proposed prices.

32.205 Procedures for offeror-proposed commercial contract financing.

- (a) Under this procedure, each offeror may propose financing terms. The contracting officer must then determine which offer is in the best interests of the United States.
- (b) Solicitations. The contracting officer shall include in the solicitation the provision at 52.232-31, Invitation to Propose Financing Terms. The contracting officer shall also—
 - (1) Specify the delivery payment (invoice) dates that will be used in the evaluation of financing proposals; and
 - (2) Specify the interest rate to be used in the evaluation of financing proposals (see paragraph (c)(4) of this section).
- (c) Evaluation of proposals. (1) When contract financing terms vary among offerors, the contracting officer must adjust each proposed price for evaluation purposes to reflect the cost of providing the proposed financing in order to determine the total cost to the Government of that particular combination of price and financing.

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- (2) Contract financing results in the Government making payments earlier than it otherwise would. In order to determine the cost to the Government of making payments earlier, the contracting officer must compute the imputed cost of those financing payments and add it to the proposed price to determine the evaluated price for each offeror.
- (3) The imputed cost of a single financing payment is the amount of the payment multiplied by the annual interest rate, multiplied by the number of years, or fraction thereof, between the date of the financing payment and the date the amount would have been paid as a delivery payment. The imputed cost of financing is the sum of the imputed costs of each of the financing payments
- (4) The time value of proposal-specified contract financing arrangements shall be calculated using as the interest rate the Nominal Discount Rate specified in Appendix C of OMB Circular A-94, "Benefit-Cost Analysis of Federal Programs; Guidelines and Discounts", appropriate to the period of contract financing. Where the period of proposed financing does not match the periods in the OMB Circular, the interest rate for the period closest to the finance period shall be used. Appendix C is updated yearly, and is available from the Office of Economic Policy in the Office of Management and Budget (OMB).

32.206 Solicitation provisions and contract clauses.

- (a) The contract shall contain the paragraph entitled "Payment" of the clause at 52.212-4, Contract Terms and Conditions—Commercial Items. If the contract will provide for contract financing, the contracting officer shall construct a solicitation provision and contract clause. This solicitation provision shall be constructed in accordance with 32.204 or 32.205. If the procedure at 32.205 is used, the solicitation provision at 52.232-31, Invitation to Propose Financing Terms, shall be included. The contract clause shall be constructed in accordance with the requirements of this subpart and any agency regulations.
 - (b) Each contract financing clause shall include:
 - (1) A description of the-
 - (i) Computation of the financing payment amounts (see paragraph (c) of this section);
 - (ii) Specific conditions of contractor entitlement to those financing payments (see paragraph (c) of this section):
 - (iii) Liquidation of those financing payments by delivery payments (see paragraph (e) of this section);
 - (iv) Security the contractor will provide for financing payments and any terms or conditions specifically applicable thereto (see 32.202-4); and
 - (v) Frequency, form, and any additional content of the contractor's request for financing payment (in addition to the requirements of the clause at 52.232-

- 29, Terms for Financing of Purchases of Commercial Items; and
- (2) Unless agency regulations authorize alterations, the unaltered text of the clause at 52.232-29, Terms for Financing of Purchases of Commercial Items.
- (c) Computation of amounts, and contractor entitlement provisions. (1) Contracts shall provide that delivery payments shall be made only for completed supplies and services accepted by the Government in accordance with the terms of the contract. Contracts may provide for commercial advance and commercial interim payments based upon a wide variety of bases, including (but not limited to) achievement or occurrence of specified events, the passage of time, or specified times prior to the delivery date(s). The basis for payment must be objectively determinable. The clause written by the contracting officer shall specify, to the extent access is necessary, the information and/or facilities to which the Government shall have access for the purpose of verifying the contractor's entitlement to payment of contract financing.
 - (2) If the contract is awarded using the offeror-proposed procedure at 32.205, the clause constructed by the contracting officer under paragraph (b)(1) of this section shall contain the following:
 - (i) A statement that the offeror's proposed listing of earliest times and greatest amounts of projected financing payments submitted in accordance with paragraph (d)(2) of the provision at 52.232-31, Invitation to Propose Financing Terms, is incorporated into the contract, and
 - (ii) A statement that financing payments shall be made in the lesser amount and on the later of the date due in accordance with the financing terms of the contract, or in the amount and on the date projected in the listing of earliest times and greatest amounts incorporated in the contract.
 - (3) If the security accepted by the contracting officer is the contractor's financial condition, the contracting officer shall incorporate in the clause constructed under paragraph (b)(1) of this section the following—
 - (i) A statement that the contractor's financial condition has been accepted as adequate security for commercial financing payments; and
 - (ii) A statement that the contracting officer may exercise the Government's rights to require other security under paragraph (c), Security for Government Financing, of the clause at 52.232-29, Terms for Financing of Purchases of Commercial Items, in the event the contractor's financial condition changes and is found not to be adequate security.
- (d) Instructions for multiple appropriations. If contract financing is to be computed for the contract as a whole, and if there is more than one appropriation account (or subaccount) funding payments under the contract, the contracting officer shall include, in the contract, instructions for

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distribution of financing payments to the respective funds accounts. Distribution instructions and contract liquidation instructions must be mutually consistent.

- (e) Liquidation. Liquidation of contract financing payments shall be on the same basis as the computation of contract financing payments; that is, financing payments computed on a whole contract basis shall be liquidated on a whole contract basis; and a payment computed on a line item basis shall be liquidated against that line item. If liquidation is on a whole contract basis, the contracting officer shall use a uniform liquidation percentage as the liquidation method, unless the contracting officer obtains the concurrence of the cognizant payment office that the proposed liquidation provisions can be executed by that office, or unless agency regulations provide alternative liquidation methods.
- (f) Prompt payment for commercial purchase payments. The provisions of Subpart 32.9, Prompt Payment, apply to contract financing and invoice payments for commercial purchases in the same manner they apply to non-commercial purchases. The contracting officer is responsible for including in the contract all the information necessary to implement prompt payment. In particular, contracting officers must be careful to clearly differentiate in the contract between contract financing and invoice payments and between items having different prompt payment times.
- (g) Installment payment financing for commercial items. Contracting officers may insert the clause at 52.232-30, Installment Payments for Commercial Items, in solicitations and contracts in lieu of constructing a specific clause in accordance with paragraphs (b) through (e) of this section, if the contract action qualifies under the criteria at 32.202-1(b) and installment payments for the item are either customary or are authorized in accordance with agency procedures.
 - (1) Description. Installment payment financing is payment by the Government to a contractor of a fixed number of equal interim financing payments prior to delivery and acceptance of a contract item. The installment payment arrangement is designed to reduce administrative costs. However, if a contract will have a large number of deliveries, the administrative costs may increase to the point where installment payments are not in the best interests of the Government.
 - (2) Authorized types of installment payment financing and rates. Installment payments may be made using the clause at 52.232-30, Installment Payments for Commercial Items, either at the 70 percent financing rate cited in the clause or at a lower rate in accordance with agency procedures.
 - (3) Calculating the amount of installment financing payments. The contracting officer shall identify in the contract schedule those items for which installment payment financing is authorized. Monthly installment payment amounts are to be calculated by the contractor pur-

suant to the instructions in the contract clause only for items authorized to receive installment payment financing.

(4) Liquidating installment payments. If installment payments have been made for an item, the amount paid to the contractor upon acceptance of the item by the Government shall be reduced by the amount of installment payments made for the item. The contractor's request for final payment for each item is required to show this calculation.

32.207 Administration and payment of commercial financing payments.

- (a) Responsibility. The contracting officer responsible for administration of the contract shall be responsible for review and approval of contract financing requests.
- (b) Approval of financing requests. Unless otherwise provided in agency regulations, or by agreement with the appropriate payment official—
 - (1) The contracting officer shall be responsible for receiving, approving, and transmitting all contract financing requests to the appropriate payment office; and
 - (2) Each approval shall specify the amount to be paid, necessary contractual information, and the account(s) (see 32.206(d)) to be charged for the payment.
- (c) Management of security. After contract award, the contracting officer responsible for approving requests for financing payments shall be responsible for determining that the security continues to be adequate. If the contractor's financial condition is the Government's security, this contracting officer is also responsible for monitoring the contractor's financial condition.

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- by the Government under this clause shall (i) excuse the Contractor from performance of obligations under this contract, or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.
 - (2) The Government's rights and remedies under this clause (i) shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract; and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.
- (e) Content of Contractor's request for financing payment. The Contractor's request for financing payment shall contain the following:
 - (1) The name and address of the Contractor;
 - (2) The date of the request for financing payment;
 - (3) The contract number and/or other identifier of the contract or order under which the request is made; and
 - (4) An appropriately itemized and totaled statement of the financing payments requested and such other information as is necessary for computation of the payment, prepared in accordance with the direction of the Contracting Officer.
- (f) Limitation on frequency of financing payments. Contractor financing payments shall be provided no more frequently than monthly.
- (g) In the event of any conflict between the terms proposed by the offeror in response to an invitation to propose financing terms (52.232-31) and the terms in this clause, the terms of this clause shall govern.

(End of clause)

52.232-29 Terms for Financing of Purchases of Commercial Items.

As prescribed in 32.206(b)(2), insert the following clause: TERMS FOR FINANCING OF PURCHASES OF COMMERCIAL ITEMS (OCT 1995)

- (a) Contractor entitlement to financing payments. The Contractor may request, and the Government shall pay, a contract financing payment as specified elsewhere in this contract when: the payment requested is properly due in accordance with this contract; the supplies deliverable or services due under the contract will be delivered or performed in accordance with the contract; and there has been no impairment or diminution of the Government's security under this contract.
- (b) Special terms regarding termination for cause. If this contract is terminated for cause, the Contractor shall, on demand, repay to the Government the amount of unliquidated contract financing payments. The Government shall be liable for no payment except as provided by the Termination for Cause paragraph of the clause at 52.212-4, Contract Terms and Conditions—Commercial Items.
- (c) Security for Government financing. In the event the Contractor fails to provide adequate security, as required in this contract, no financing payment shall be made under this contract. Upon receipt of adequate security, financing payments shall be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the provisions for contract financing. If at any time the Contracting Officer determines that the security provided by the Contractor is insufficient, the Contractor shall promptly provide such additional security as the Contracting Officer determines necessary. In the event the Contractor fails to provide such additional security, the Contracting Officer may collect or liquidate such security that has been provided and suspend further payments to the Contractor; and the Contractor shall repay to the Government the amount of unliquidated financing payments as the Contracting Officer at his sole discretion deems repayable.
 - (d) Reservation of rights. (1) No payment or other action

52.232-30 Installment Payments for Commercial Items.

As prescribed in 32.206(g), insert the following clause: INSTALLMENT PAYMENTS FOR COMMERCIAL ITEMS (OCT 1995)

- (a) Contractor entitlement to financing payments. The Contractor may request, and the Government shall pay, a contract financing installment payment as specified in this contract when: the payment requested is properly due in accordance with this contract; the supplies deliverable or services due under the contract will be delivered or performed in accordance with the contract; and there has been no impairment or diminution of the Government's security under this contract
- (b) Computation of amounts. Installment payment financing shall be paid to the Contractor when requested for each separately priced unit of supply (but not for services) of each contract line item in amounts approved by the Contracting Officer pursuant to this clause.
 - (1) Number of installment payments for each contract line item. Each separately priced unit of each contract line item is authorized a fixed number of monthly installment payments. The number of installment payments authorized for each unit of a contract line item is equal to the number of months from the date of contract award to the

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date one month before the first delivery of the first separately priced unit of the contract line item. For example, if the first scheduled delivery of any separately priced unit of a contract line item is 9 months after award of the contract, all separately priced units of that contract line item are authorized 8 installment payments.

- (2) Amount of each installment payment. The amount of each installment payment for each separately priced unit of each contract line item is equal to 70 percent of the unit price divided by the number of installment payments authorized for that unit.
- (3) Date of each installment payment. Installment payments for any particular separately priced unit of a contract line item begin the number of months prior to the delivery of that unit that are equal to the number of installment payments authorized for that unit. For example, if 8 installment payments are authorized for each separately priced unit of a contract line item, the first installment payment for any particular unit of that contract line item would be 8 months before the scheduled delivery date for that unit. The last installment payment would be 1 month before scheduled delivery of a unit.
- (4) Limitation on payment. Prior to the delivery payment for a separately priced unit of a contract line item, the sum of all installment payments for that unit shall not exceed 70 percent of the price of that unit.
- (c) Contractor request for installment payment. The Contractor may submit requests for payment of installment payments not more frequently than monthly, in a form and manner acceptable to the Contracting Officer. Unless otherwise authorized by the Contracting Officer, all installment payments in any month for which payment is being requested shall be included in a single request, appropriately itemized and totaled.
- (d) Dates for payment. An installment payment under this clause is a contract financing payment under the Prompt Payment clause of this contract, and except as provided in paragraph (e) of this clause, approved requests shall be paid within 30 days of submittal of a proper request for payment.
- (e) Liquidation of installment payments. Installment payments shall be liquidated by deducting from the delivery payment of each item the total unliquidated amount of installment payments made for that separately priced unit of that contract line item. The liquidation amounts for each unit of each line item shall be clearly delineated in each request for delivery payment submitted by the Contractor.
- (f) Security for installment payment financing. In the event the Contractor fails to provide adequate security as required in this contract, no financing payment shall be made under this contract. Upon receipt of adequate security, financing payments shall be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the contract. If at any time the Contracting Officer determines that the security provided by the Contractor is insufficient, the Contractor shall promptly provide such additional security as the Contractor fails to provide such additional security, the Contractor fails to provide such additional security, the Contracting Officer may collect 52-190

or liquidate such security that has been provided, and suspend further payments to the Contractor; the Contractor shall repay to the Government the amount of unliquidated financing payments as the Contracting Officer at his sole discretion deems repayable.

- (g) Special terms regarding termination for cause. If this contract is terminated for cause, the Contractor shall, on demand, repay to the Government the amount of unliquidated installment payments. The Government shall be liable for no payment except as provided by the Termination for Cause paragraph of the clause at 52.212-4, Contract Terms and Conditions—Commercial Items.
- (h) Reservation of rights. (1) No payment, vesting of title under this clause, or other action taken by the Government under this clause shall (i) excuse the Contractor from performance of obligations under this contract, or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.
 - (2) The Government's rights and remedies under this clause (i) shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract, and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.
- (i) Content of Contractor's request for installment payment. The Contractor's request for installment payment shall contain the following:
 - (1) The name and address of the Contractor;
 - (2) The date of the request for installment payment;
 - (3) The contract number and/or other identifier of the contract or order under which the request is made; and
 - (4) An itemized and totaled statement of the items, installment payment amount, and month for which payment is being requested, for each separately priced unit of each contract line item.

(End of clause)

52.232-31 Invitation to Propose Financing Terms.

As prescribed in 32.205(b) and 32.206, insert the following provision:

INVITATION TO PROPOSE FINANCING TERMS (OCT 1995)

- (a) The offeror is invited to propose terms under which the Government shall make contract financing payments during contract performance. The financing terms proposed by the offeror shall be a factor in the evaluation of the offeror's proposal. The financing terms of the successful offeror and the clause, Terms for Financing of Purchases of Commercial Items, at 52.232-29, shall be incorporated in any resulting contract.
- (b) The offeror agrees that in the event of any conflict between the terms proposed by the offeror and the terms in the clause at 52.232-29, Terms for Financing of Purchases of Commercial Items, the terms of the clause at 52.232-29 shall govern.
 - (c) Because of statutory limitations (10 U.S.C. 2307(f) and

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- 41 U.S.C. 255(f)), the offeror's proposed financing shall not be acceptable if it does not conform to the following limitations:
 - (1) Delivery payments shall be made only for supplies delivered and accepted, or services rendered and accepted in accordance with the payment terms of this contract;
 - (2) Contract financing payments shall not exceed 15 percent of the contract price in advance of any performance of work under the contract;
 - (3) The terms and conditions of the contract financing must be appropriate or customary in the commercial marketplace; and
 - (4) The terms and conditions of the contract financing must be in the best interests of the United States.
- (d) The offeror's proposal of financing terms shall include the following:
 - (1) The proposed contractual language describing the contract financing (see FAR 32.202-2 for appropriate definitions of types of payments); and
 - (2) A listing of the earliest date and greatest amount at which each contract financing payment may be payable and the amount of each delivery payment. Any resulting contract shall provide that no contract financing payment shall be made at any earlier date or in a greater amount than shown in the offeror's listing.
- (e) The offeror's proposed prices and financing terms shall be evaluated to determine the cost to the United States of the proposal using the interest rate and delivery schedule specified elsewhere in this solicitation.

(End of provision)

Section M Evaluation & Award

Informal Lecture and View-graphs

(30 minutes)

Learning Objective: Knowledge sufficient to select and apply appropriate evaluation criteria for determining a best-value award in the acquisition of a commercial item.

SOLICITATION PROVISION

FAR 52.212-2 Evaluation — Commercial Items

Viewgraph M-1

- 1. Using optional provision at FAR 52.212-2
 - a. Make award to the responsible offeror whose offer will be most advantageous to the government, price and other factors considered.
 - b. The contracting Officer must insert the significant evaluation factors, such as (i) technical capability of the item offered to meet the government's requirement; (ii) price; and (iii) past performance. Additionally, the relative order of importance of the evaluation factors must be specified, such as "in descending order of importance."
 - c. The Contracting Officer must state the relative importance of all other evaluation factors, when combined, compared to price.

52.212-2 EVALUATION - COMMERCIAL ITEMS (DATE)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors Contracting Officer insert the relative order of importance of the evaluation factors such as "in descending order of importance" (see 15.605) shall be used to evaluate offers:

Contracting Officer insert the significant evaluation factors, such as (i) technical capability of the item offered to meet the Government requirement; (ii) price; (iii) past performance (see 15.605).

Technical and past performance, when combined, are <u>Contracting</u> <u>Officer state</u>, in accordance with 15.605, the relative importance of all <u>other evaluation factors</u>, when combined, when compared to price.

- (b) <u>Options</u>. The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).
- (c) A written award or acceptance of offer mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.

DEVELOPING EVALUATION FACTORS

Use standard factors as starting point

- Technical capability
- Past performance
- Price

Viewgraph M-2

2. Developing evaluation factors for acquiring commercial items.

Use standard evaluation factors as a starting point.

- a. Technical capability (i.e., how well proposed products meet the government's requirement).
- b. Past performance.
- c. Price.

FAR 12.602 outlines a streamlined, best-value approach to evaluate offers for commercial items. It is a simplified source selection procedure that allows considerable discretion in selecting the successful offeror. It may be appropriate for a wide range of commercial products. The procedure itself is streamlined, but the key to its successful use will be full documentation of the award decision, including discussion of trade-offs considered and made.

The FAR encourages contracting officers' to use an offeror's existing product literature to show product capabilities, rather than unique technical proposals (12.205). ("Product literature" means, for example, the product data sheet and instructions that came in the box with the VCR you bought last week.) Typically, existing commercial product literature contains a wealth of information on capabilities, statistics, and performance that can be used to determine whether an offered item satisfies our requirement. That same literature can also be used to compare competing products.

As mentioned above, the FAR encourages the submission of existing product literature. That same literature may be used, where possible, to evaluate items offered (12.602). The commercial items drafting team talked about using <u>Consumer Reports</u> and other independent product reviews for evaluation purposes. That didn't get into the FAR, but I would suggest that it might be appropriate in some cases. <u>Be careful that if you do use product reviews they must be independent.</u> As always, utilization of such information must be fully documented.

When we contract for commercial items, we are at the same time contracting for that firm's commercial quality assurance system — whatever that is. Thus, product quality is likely to become a more significant factor in award decisions. If it is appropriate, structure your evaluation to score more heavily those firms that have independently been recognized (e.g., ISO 9000, Baldridge Award, etc.) as quality suppliers.

Consideration of past performance in award decisions can help us avoid suppliers of marginal (or worse) commercial items and rate quality contractors more highly. Finally, the contract warranty provisions should provide another measure of protection to ensure that the government receives products of satisfactory quality. (from the GSA Primer)

12.602 Streamlined evaluation of offers.

(a) When evaluation factors are used, the Contracting officer may insert a provision substantially the same as the provision at 52.212-2, Evaluation - Commercial Items in solicitations for commercial items. Paragraph (a) of that provision shall be tailored to the specific acquisition to describe the evaluation factors and relative importance of those factors. This provision contemplates an approach designed to select the source whose offer will provide the Government with the greatest

- value in terms of performance and other factors. Other methods of evaluation and bases for award may be more appropriate for a given acquisition.
- (b) Offers shall be evaluated in accordance with the criteria contained in the solicitation. For many commercial items, the criteria need not be more detailed than technical (capability of the item offered to meet the agency need), price, and past performance. Technical capability may be evaluated by how well the proposed products meet the government's requirement instead of predetermined subfactors. Solicitations for commercial items do not have to contain subfactors for technical capability when the solicitation adequately describes the item's intended use. A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features, and warranty provisions. Past performance shall be evaluated in accordance with the procedures in 48 CFR Part 15, Subpart 15.6. The contracting officer shall ensure the instructions provided in the provision at 52.212-1, Instructions to Offerors - Commercial Items, and the evaluation criteria provided in the provision at 52.212-2, Evaluation – Commercial Items, are in agreement.
- (c) Select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered.

Subfactors

- a. <u>FAR Part 12 solicitations do not have to contain subfactors</u> for technical capability when the solicitation adequately describes the items intended use.
- b. Base technical evaluations on such things as product literature, product samples (if requested), technical features, and warranty provisions.
- c. <u>In general, use as simple a set of evaluation factors as possible for acquiring commercial items</u>.

PAST PERFORMANCE

Important in every Part 12 acquisition.

Viewgraph M-3

- 3. Past Performance as an evaluation factor
 - a. Past performance should be an important factor in every Part 12 acquisition.
 - b. When past performance is an evaluation factor, FAR 52.212-1, "Instructions to Offerors Commercial Items," requires offerors to include, at minimum, contract numbers, points of contact with telephone numbers, and other relevant information.

Consideration of an offeror's past performance in making award decisions is typical of commercial acquisitions. The FAR recently was amended to mandate consideration of past performance in all government award decisions, including those for commercial items. Consideration of an offeror's past performance should better enable us to contract with quality suppliers.

12.206 Use of past performance.

Past performance should be an important element of every evaluation and contract award for commercial items. Contracting officers should consider past performance data from a wide variety of sources both inside and outside the Federal Government in accordance with the policies and procedures contained in 48 CFR Part 9, (FAR) Subpart 9.1 and 48 CFR Part 15, (FAR) Subpart 15.6.

12.205 Offers.

(a) Agencies should, as part of market research, review existing product literature generally available in the industry to determine its adequacy for purposes of evaluation. If adequate, contracting officers shall request existing product literature from offerors of commercial items in lieu of unique technical proposals.

- (b) Contracting officers should allow offerors to propose more than one product that will meet a Government need in response to solicitations for commercial items. The contracting officer shall evaluate each product as a separate offer.
- (c) Contracting officers may, considering the circumstances described in 5.203(b), allow fewer than 30 days response time for receipt of offers for commercial items.

4. Evaluation of Options.

- a. Evaluate offers by adding the total price for all options to the total price for the basic requirement.
- b. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced.
- c. The evaluation of options shall not obligate the Government to exercise them.

5. Evaluation of Different Terms and Conditions

Part 12 allows contracting officers to accept offers showing different terms and conditions. Your solicitation should indicate which terms and conditions are negotiable (i.e., allow consideration of alternatives that may be offered) and which are not. Be aware that there are differences in seller and buyer terms and conditions, and know that you don't have to accept the offeror's terms. Your market leverage is likely to be the key. If your buy is small, the seller may not find it worth his time to negotiate terms and conditions with you. You might be told, "These are my terms, take them or leave them." If you are negotiating a large contract, by all means use that market leverage to negotiate terms and conditions that protect and are favorable to the government's interests. (from GSA Primer)

This will be a new ball game for government procurement personnel, and it's likely to be a difficult area. The possible alternatives that may be offered for consideration are virtually limitless. For one simple example, consider the warranty. For a best-value acquisition of scientific equipment items, Firm X offers a one-year warranty while Firm Z offers a higher price but includes a two-year warranty. During negotiations, Firm X increases its warranty offer to eighteen-months. Both firms' prices are unchanged. Which is better? The CO and requirements personnel will have to consider whether the

additional six months of warranty coverage is worth the higher price. (Of course, this is just one element of the overall evaluation, singled out here to demonstrate the point.) There may not be a single "right" answer. It's a judgment call, allowing full exercise of your professional knowledge. Whatever the choice, you must fully document the rationale for the decision.

(from GSA Primer)

6. Evaluating Express Warranties

- a. The question is whether the offered warranty protects the Government's interest at least as well as the implied warranty (especially if an express warranty disclaims the implied warranties).
- b. Any express warranty must meet the needs of the Government. Before accepting the proposed commercial warranty, question whether:
 - (1) The warranty is adequate to protect the needs of the Government, considering such matters as coverage and length of the warranty.
 - (2) The proposed terms can be effectively administered (including the identification of warranted items, procedures for the return of warranted items to the contractor for repair or replacement, and the collection of product performance information).
 - (3) The warranty is cost effective.
- 7. Duration of an Express Warranty versus. "Reasonable time"
 - a. Express warranties overcome "a reasonable time after the defect was discovered or should have been discovered," within a definite time period.
 - b. The benefit to the government of the definite time period of an express warranty must be evaluated against indefinite term "reasonable." (Is the time period expressed reasonable?)

Express Warranties – Pros and Cons

a. Generally limit or redefine implied warranties.

b. Substitute definite for indefinite – benefits both parties.

8. Multiple Offers

The FAR (12.205) recommends that firms be allowed to offer more than one item in response to a solicitation for commercial items. In conjunction a performance specification a company may offer one or more products (all of which will satisfy our requirement) from their standard product line. The government must select the product determined to be the best-value purchase. For example, a pocketknife manufacturer might offer three models from the catalog, ranging from the top-of-the-line, highest-priced model down to the basic single-blade, olive-drab pocket knife. If our solicitation so allows, we can select the model that represents the best value for our specific intended use.

9. Award

- a. A written award or acceptance of offer mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer shall result in a binding contract without further action by either party.
- b. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.
- c. Remember: The SF 1449 is required for solicitation and award. Offerors are not required to use the form to submit their offers They may submit offers on their letterhead. However, any award for commercial items must be made on the SF 1449.

NOTE: Section 4201 of the Federal Acquisition Reform Act of 1995 provides an exception to the Truth in Negotiations Act for "the acquisition of a commercial item." This provision will eliminate all cost or pricing data requirements for commercial items.

10. Pricing contracts for commercial items.

When contracting by negotiation for commercial items, follow the policies and procedures in Part 15 to establish the reasonableness of prices.

a. If pricing information is necessary for the "commercial item

- exception" at 15.804-1(a)(2), insert the provisions and clauses in the Part 12 solicitation prescribed in 15.804-8 and 15.106 for this purpose.
- b. If cost or pricing data are required, insert the provision and clauses prescribed in 15.804-8 and 15.106 in an addendum to the solicitation.

12.209 Pricing of commercial items when contracting by negotiation.

- (a) When contracting by negotiation for commercial items, the policies and procedures in Part 15 shall be used to establish the reasonableness of prices.
- (b) The provisions and clauses prescribed in this part for the acquisition of commercial items do not include the provisions and clauses prescribed in Part 15 because they assume prices for commercial items will either (1) not be subject to the Truth in Negotiations Act because the contract price is below the dollar threshold for application of the Act; or (2) be based upon one of the exceptions to cost or pricing data requirements contained in 15.804-1(a)(1).
- (c) If the contracting officer determines it is appropriate to use the commercial item exception to cost or pricing data requirements (see 15.804-1(a)(2)), the provisions and clauses prescribed in 15.804-8 and 15.106 for this purpose shall be inserted in an addendum to the solicitation and contract.
- (d) If the contracting officer is required to obtain cost or pricing data (see 15.804-1(b)(4) and 15.804-2), the provisions and clauses prescribed in 15.804-8 and 15.106 for this purpose shall be inserted in an addendum to the solicitation and contract.
- (e) When a contract is priced using the exceptions at 15.804-1(a)(1), no cost or pricing data may be obtained for modifications unless the proposed modification would change the contract from a contract for a commercial item to a contract for other than a commercial item (see 15.804-1(b)(6)). If the exceptions at 15.804-1(a)(1) are not used, the contracting officer may be required to obtain cost or pricing data to determine the reasonableness of prices for subsequent modifications (see 15.804-2(a)(1)) and the contracting officer shall insert the provisions and clauses prescribed for this purpose in an addendum to the solicitation and contract.

15.804-8 Contract clauses and solicitation provisions.

- (h) Requirements for cost or pricing data or information other than cost or pricing data. Considering the hierarchy at 15.802, the contracting officer may insert the provision at 52.215-41, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data, in solicitations if it is reasonably certain that cost or pricing data or information other than cost or pricing data will be required. This provision also provides instructions to offerors on how to request an exception. Use the provision with Alternate I to specify a format for cost or pricing data other than the format required by Table 15-2 of 15.804-6(b). Use the provision with Alternate II when copies of the proposal are to be sent to the administrative contracting officer and contract auditor. Use the provision with Alternate III when submission via electronic media is required. Replace the basic provision with Alternate IV when a SF 1411 will not be required because an exception applies, but information other than cost or pricing data is required as described in 15.804-5.
- (i) Requirements for cost or pricing data or information other than cost or pricing data—modifications. Considering the hierarchy at 15.802, the contracting officer may insert the clause at 52.215-42, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data—Modifications, in solicitations and contracts if it is reasonably certain that cost or pricing data or information other than cost or pricing data will be required for modifications. This clause also provides instructions to contractors on how to request an exception. Use the clause with Alternate I to specify a format for cost or pricing data other than the format required by Table 15-2 of 15.804-6(b). Use the clause with Alternate II if copies of the proposal are to be sent to the administrative contracting officer and contract auditor. Use the clause with Alternate III if submission via electronic media is required. Replace the basic clause with Alternate IV if a SF 1411 is not required because an exception may apply, but information other than cost or pricing data is required as described in 15.804-5.

15.804 Cost or pricing data and information other than cost or pricing data.

15.804-1 Prohibition on obtaining cost or pricing data

- (b) Standards for exceptions from cost or pricing data requirements—
 - (1) Adequate price competition. A price is based on adequate

price competition if—

- (4) Commercial items. For acquisition of a commercial item, if the contracting officer does not have sufficient information to support an exception under 15.804-1(a)(1) or (a)(4), the contracting officer shall grant an exception for a contract, subcontract, or modification of a contract or subcontract if the contracting officer obtains the pricing information described in 15.804-5(b). Cost or pricing data may be obtained for such a commercial item only if the contracting officer makes a written determination that the pricing information is inadequate for performing a price analysis and determining price reasonableness.
- (6) Modifications. This exception only applies when the original contract or subcontract was exempt from cost or pricing data based on adequate price competition, catalog or market price, or price set by law or regulation (15.804-1(a)(1)). For modifications of contracts or subcontracts for commercial items, the exception at 15.804-1(a)(4) applies if the modification does not change the item from a commercial item to a noncommercial item. However, if the modification to a contract or a subcontract changes the nature of the work under the contract or subcontract either by a change to the commercial item or by the addition of other noncommercial work, the contracting officer is not prohibited from obtaining cost or pricing data for the added work.

15.804-2 Requiring cost or pricing data.

- (a)(1) Pursuant to 10 U.S.C. 2306a and 41 U.S.C. 254b, cost or pricing data shall be obtained only if the contracting officer concludes that none of the exceptions in 15.804-1 applies. However, if the contracting officer has sufficient information available to determine price reasonableness, then a waiver under the exception at 15.804-1(b)(5) should be considered. The threshold for obtaining cost or pricing data is \$500,000. This amount will be subject to adjustment, effective October 1, 1995, and every five years thereafter. Unless an exception applies, cost or pricing data are required before accomplishing any of the following actions expected to exceed the threshold in effect on the date of agreement on price, or the date of award, whichever is later; or, in the case of existing contracts, the threshold specified in the contract:
 - (i) The award of any negotiated contract (except for

undefinitized actions such as letter contracts).

- (ii) The award of a subcontract at any tier, if the contractor and each higher-tier subcontractor have been required to furnish cost or pricing data (but see exceptional cases at 15.804-1(b)(5)).
- (iii) The modification of any sealed bid or negotiated contract (whether or not cost or pricing data were initially required) or subcontract covered by paragraph (a)(1)(ii) of this subsection. Price adjustment amounts shall consider both increases and decreases. (For example, a \$150,000 modification resulting from a reduction of \$350,000 and an increase of \$200,000 is a pricing adjustment exceeding \$500,000.) This requirement does not apply when unrelated and separately priced changes for which cost or pricing data would not otherwise be required are included for administrative convenience in the same modification.

SECTION N Rejection of Supplies

Informal Lecture and Viewgraphs

(60 minutes)

Learning Objective: Knowledge of the standard procedures for rejecting nonconforming supplies or services under a contract for commercial items under FAR Part 12.

STANDARD COMMERCIAL PRACTICES

- 1. If the goods fail *in any respect* to conform, the buyer may
 - (i) reject the goods or,
 - (ii) opt to accept the goods in spite of the nonconformity.
- 2. Buyer may accept any commercial unit and reject the rest.

Viewgraph N-1

1. Standard Commercial Practices

- a. If the goods or the tender of delivery fail *in any respect* to conform to the contract, the buyer may (i) reject the goods or (ii) opt to accept the goods in spite of the non-conformity. Further buyer may accept any commercial unit and reject the rest. (UCC § 2-601)
- b. Seller has right to **cure** (repair/replace)
- c. Practices consistent with FAR 52-212-4 procedures.

$FAR\ 52.212-4(a)$

..... The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price.

..... The Government must exercise its post-acceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

REJECTION

Rejecting Goods Before Acceptance

Viewgraph N-2

STEPS OF REJECTION

- Rejection of goods must be within a reasonable time after their delivery or tender; and
- Buyer is required to state a reason(s) for rejection where (1) a defect is ascertainable by a reasonable inspection, and (2) the seller could have cured it if stated seasonably (punctually/promptly).

Viewgraph N-2a

2a. Steps of Rejection

- a) Rejection of goods must be within a reasonable time after their delivery or tender; **and**
- b) Buyer is required to state his reason for rejection where (1) a defect is ascertainable by a reasonable inspection, and (2) the seller could have cured it if stated seasonably (punctually/promptly).

SELLER'S RIGHTS TO CURE NON-CONFORMING GOODS

- Time for performance has not expired.
- Time for performance has expired.

Viewgraph N-2b

- 2b. Seller's Rights to Cure Non-Conforming Goods when:
 - a) Time for performance has not expired.

Where any delivery is rejected because goods are non-conforming and the time for performance has not yet expired, seller (1) may reasonably notify buyer of his intention to cure and (2) may then within the contract time make a conforming delivery.

b) Time for performance has expired.

Where buyer rejects a non-conforming tender, which seller had *reasonable grounds to believe* would be acceptable, seller may, if seller seasonably (punctually/promptly) notifies buyer, have a further reasonable time to substitute a conforming tender.

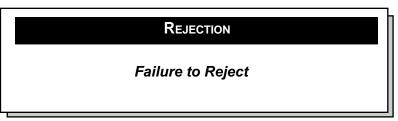
Reasonable grounds example: Seller delivers what seller believes to be a newer and better model of a hearing aid than that called for in the contract with buyer. Buyer rejects. Seller may cure.

EFFECTS OF REJECTION

- Buyer does not keep goods; seller takes them back.
- Timely notice gives seller opportunity to **cure**; permits seller to assist in minimizing buyer's losses; return the goods to seller early before they have depreciated.

Viewgraph N-2c

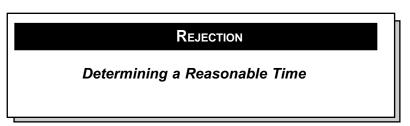
- 2c. Effects of Rejection
- a) Buyer does not keep goods; seller takes them back.
- b) Timely notice of rejection gives seller opportunity to **cure**; permits seller to assist in minimizing buyer's losses; returns the goods to seller early before they have depreciated.



Viewgraph N-2d

2d. Failure to Reject

A tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance. Accordingly, once the buyer has had a reasonable opportunity to inspect the goods, if the buyer fails to make an effective rejection—this is, the rejection must be within a reasonable time after delivery or tender and the buyer must seasonably notify seller—acceptance of the goods occurs. In this situationthe buyer's untimely rejection is said to be ineffective.



Viewgraph N-2e

2e. Determining "reasonable time"

- a) Difficulty of discovery of the defect Example: Undersized potatoes vs. hidden defect in automobile.
- b) The contract terms

 Example: "Buyer shall have _____ hours (or days) after receipt of the goods to either accept or reject them. If the goods are rejected, notice of rejection must be sent to seller at (address) within _____ hours (or days) after receipt of goods by buyer."
- c) Perishability of the goods
 Example: Buyer's delay of five days in notifying seller of rejection of non-conforming shrimp is unreasonable.

REJECTION

Rejecting Goods After Acceptance (Revocation)

Viewgraph N-3

FAR 52.212-4(a) — The Government can reject accepted items found subsequently to be defective only if it acts –

- Within a reasonable time after the defect was discovered or should have been discovered; and
- Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.
- 3a. It is more difficult for a buyer to revoke acceptance of goods than to have rejected them prior to acceptance for two reasons:
 - The longer the buyer has the goods, the higher the probability that the alleged defect was caused by or aggrevated by the buyer's failure to maintain the goods properly.
 - The longer the buyer holds the goods (if they are used), the greater the benefit the buyer will have derived from them.

REQUIREMENTS FOR REVOCATION

- Non-conformity must *substantially* impair value of the goods.
- Buyer must have accepted the goods:
 - On the assumption that non-conformity would be cured and it has not been, or
 - Without discovery if discovery was difficult or acceptance was based on seller's assurances.

Viewgraph N-3a

REQUIREMENTS FOR REVOCATION (CONTINUED)

- Revocation must occur within a reasonable time after buyer discovered or should have discovered defects.
- Revocation must occur before any substantial change in condition of the goods not caused by defects.

Viewgraph N-3b

3b. Requirements for Revocation

- a) Non-conformity must *substantially* impair the value of the goods to the buyer (UCC at § 2-608(1)).
- b) Buyer must have accepted the goods:
 - On the reasonable assumption that the non-conformity would be cured and it has not been seasonably (punctually/promptly) cured; or
 - Without discovery of such non-conformity if buyer's acceptance was reasonably induced by either (i) the difficulty of discovery before acceptance or (ii) the seller's assurances. (UCC at § 2-608(1), 2-607(2), 2-508)
- c) Revocation of acceptance must occur within a reasonable time after buyer discovered or should have discovered the grounds for it; such revocation is not effective until buyer notifies seller. (UCC at § 2-608(2)).
- d) Revocation of acceptance must occur before any substantial change in condition of the goods which is not caused by their own defects. (UCC at § 2-608(2)).

Issues/Steps in Rejecting Work After Acceptance

- Same buyer's rights with regard to goods as if buyer rejected prior to acceptance
- Buyer is required to state reason for rejection where defect –
 - Is ascertainable by reasonable inspection, or
 - Could have been cured.

Viewgraph N-3c

- 3c. Issues/steps in rejecting work after acceptance
- a) A buyer who revokes acceptance has the same rights and duties with regard to goods as if buyer had rejected them prior to acceptance (UCC § 2-608(3), 2-711(1).
- b) Buyer is required to state his reason for rejection where (1) a defect is ascertainable by a reasonable inspection, and (2) the seller could have cured it if stated seasonably (punctually/promptly).

DETERMINING REASONABLE TIME

- Revocation is exercised only *after* attempts at adjustment have failed.
- Reasonable time period should extend beyond—
 - The time in which notification of breach must be given, and
 - The time for rejection after tender.

Viewgraph N-3d

3d. Determining reasonable time.

Since revocation of acceptance generally will be exercised only *after* attempts at adjustment have failed (*seller's cure-see above*), the reasonable time period should extend in most cases *beyond* the time in which notification of breach must be given (UCC § 2-607(3)) and *beyond* the time for rejection after tender (UCC § 2-602(1)).

REJECTING AFTER ACCEPTANCE (CONTINUED)

Determining Whether a Substantial Change has Occurred in the Item

Viewgraph N-3e

3e. Determining whether a substantial change has occurred in the item

Let's try to cover this concept with an example: A defective steering mechanism causes the driver of a car to lose control after having driven only 468 miles, and the car is demolished. Substantial change in condition was caused by the defect in the goods.

REJECTING AFTER ACCEPTANCE (CONTINUED)

Remedies Where Buyer has Finally Accepted the Goods

Viewgraph N-4

4. Remedies where buyer has finally accepted the goods

UCC § 2-714 deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone buy (UCC §§ 2-714, 2-606, 2-607, 2-608). In this situation, the damages are measured thus: Where the buyer has accepted the goods, the buyer may recover as damages for any nonconformity of tender (e.g., goods do not conform to seller's warranties), the loss resulting in the ordinary course of events from seller's breach as determined in any manner which is reasonable. § 2-714(1). Of course, buyer must, within a reasonable time after buyer discovers or should have discovered any breach, notify seller of breach or be barred from any remedy. §§ 2-714(1), 2-607(3)(a).

The usual standard and reasonable method of ascertaining damages in the case of breach of warranty, but not intended as an exclusive measure, is as follows: The measure of damages for

breach of warranty is the difference (at the time and place of acceptance) between the value of the goods accepted and the value they would have had if they had been as warranted (UCC § 2-714(2)).

Example: Seller and buyer enter into a contract for sale of carpeting for \$14 per square yard. Lines appeared in the carpeting constituting a breach of warranty per §§ 2-313, 2-314, 2-315. The salvage value of the scrap was \$4 per square yard. Buyer's damages were \$10 per square yard, the difference between the value of the goods accepted (\$4 per square yard) and the value they would have had if they had been as warranted. (\$14 per square yard purchase price is probably good evidence of the value of the goods if they had been as warranted). Buyer, on notifying seller of his intention to do so, may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

Further, in a proper case, (1) *incidental* damages (damages incident to the breach) may also be recovered and (2) *consequential* damages may also be recovered. §§ 2-714(3), 2-715. Consequential damages resulting from seller's breach involve both (1) economic loss (e.g., loss of profit) and (2) injury to person or property. § 2-715(2)(a) and (b).

Standard Commercial Practices

Causation. In an action based on breach of warranty it is necessary to show not only the existence of the warranty but the fact that the warranty was broken. Further is it necessary to show that the breach of the warranty was the proximate cause of the loss sustained. In such an action, an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as a matter bearing on whether the breach itself was the cause of the injury (§ 2-314).

Statute of Limitation. Seller may assert the UCC statue of limitations as a defense. It states that an action for breach of a sales contract must be commenced within four years after the cause of action has accrued. § 2-725.

Notice of Breach. Where a tender has been accepted, the buyer must, within a reasonable time after he discovers or should have discovered any

breach, notify the seller of breach or be barred from *any* remedy. § 2-607(3)(a). The *notification* which saves the buyer's rights need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement thorough negotiation. The *time* of notification is to be determined by applying commercial standards.

Section O Express Warranties

Informal Lecture and Viewgraphs

(30 minutes)

Learning Objective: Understanding the relationship of express warranties to implied warranties sufficient to evaluate whether an express warranty will increase or diminish the Government's rights for correction of defective supplies or services under a contract for commercial items.

12.404 Warranties.

- (b) Express warranties. The Federal Acquisition Streamlining Act of 1994 (41 U.S.C. 264 note) requires contracting officers to take advantage of commercial warranties. To the maximum extent practicable, solicitations for commercial items shall require offerors to offer the Government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice. Solicitations may specify minimum warranty terms, such as minimum duration, appropriate for the Government's intended use of the item.
 - (1) Any express warranty the Government intends to rely upon must meet the needs of the Government. The contracting officer should analyze any commercial warranty to determine if—
 - (i) The warranty is adequate to protect the needs of the Government, e.g., items covered by the warranty and length of warranty;
 - (ii) The terms allow the Government effective post-award administration of the warranty to include the identification of warranted items, procedures for the return of warranted items to the contractor for repair or replacement, and collection of product performance information; and
 - (iii) The warranty is cost effective.
 - (2) In some markets, it may be customary commercial practice for contractors to exclude or limit the implied warranties contained in 52.212-4 in the provisions of an expressed warranty. In such cases, the contracting officer shall ensure that the express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance.

(3) Express warranties shall be included in the contract by addendum (see 12.302).

EXPRESS WARRANTIES

Relationship of Express Warranties to Implied Warranties

Viewgraph O-1

- 1. Relationship of express warranties to implied warranties
 - a) Both are warranties of quality.
 - b) For an express warranty to be created, an affirmation, promise, description, or sample must become "part of the basis of the bargain." (UCC at § 2-313(1). Under the UCC, it is recognized that in actual practice affirmations, etc. made by the seller are regarded as *part* of the basis of the bargain, hence no particular reliance on the affirmation need be shown in order to weave them into the fabric of the agreement.
 - c) Implied warranties rest on a common factual situation or set of conditions that no particular language or action is necessary to evidence them.
 - d) In some markets, it may be customary commercial practice for contractors to exclude or limit the implied warranties contained in 52.212-4 in the provisions of an expressed warranty. In such cases, the contracting officer shall ensure that the express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance.

EXPRESS WARRANTIES (CONTINUED)

Seller's express warranties rest on "negotiated" aspects of an individual bargain.

Viewgraph O-2

2. Express Warranties

Seller's express warranties rest on "negotiated" aspects of an individual bargain. § 2-313(1). These warranties state that:

- Goods shall conform to any affirmation of fact made by seller to buyer which relates to the goods. Example: "The goods are 100% wool."
- Goods shall conform to any *promise* made by seller to buyer which relates to the goods. Example: "The color of the cloth supplied by the seller under this contract will not fade."
- Goods shall conform to any *description* of the goods. Example: "Seller agrees to supply to buyer goods of the following description [*describe* the *goods*]."
- The whole of the goods shall conform to any *sample* (or model) of the goods. Example: "Seller agrees to supply the buyer with goods according to the sample [or model] supplied by the buyer."

3. Contractor disclaimers of implied warranties

Contractors may wish to exclude or limit implied warranties contained in FAR 52,212-4(o). Industry buyers often use purchase orders that explicitly or implicitly include UCC implied warranties. Sellers generally disclaim the implied warranties in the letters of acceptance. This is known as the "battle of the forms." In such cases, courts invariably rule that the implied warranties stand that disclaimers are NOT part of the contract. Hence, determine customary practice based on the contract—the terms of sale actually upheld by the courts.

Magnuson-Moss Federal Warranty Act

Viewgraph O-4

4. Magnuson-Moss Federal Warranty Act

Under this Act, certain written consumer product warranties must fully and conspicuously disclose terms and conditions of the warranty, including whether such warranty is "full" or "limited." Under a full warranty, a warrantor must remedy the consumer product within a reasonable time and without charge (in case of a defect, etc.); a warrantor may not limit the duration of implied warranties; exclusion or limitation of consequential damages must appear conspicuously on the face of the warranty; after a reasonable number of attempts to remedy defects, the consumer may elect either a refund or replacement.

STANDARD COMMERCIAL PRACTICES FOR EXCLUSION OR MODIFICATION OF IMPLIED WARRANTIES

- Warranty of title
- Warranties of quality

Viewgraph O-5

5. Standard Commercial Practices for Exclusion or Modification of Implied Warranties

Warranty of Title

A warranty of title (§ 2-312(1)) will be excluded or modified only as follows:

- (a) By specific *language*, e.g., "Seller does not warrant that the title to the goods conveyed to buyer is good; nor that the transfer of the goods to buyer is rightful; nor that the goods are delivered to the buyer free from any security interest or other lien or encumbrance."
- (b) By *circumstances* "which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have, (e.g., sales by sheriffs, executors, foreclosing lienors and persons similarly situated. UCC § 2-312(2)).

Warranties of Quality

(1) Examination

"When the buyer, before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him." § 2-316(3)(b).

(2) Course of Dealing, Course of Performance or Usage of Trade

An implied warranty can be excluded or modified by course of dealing or course of performance or usage of trade. § 2-316(3)(c). Example: A cattle buyer inspects cattle and cuts out those that do not suit him. Held: This is a usage of trade that his acceptance of others "is irrevocable and without recourse," and thus excludes all implied warranties.

(3) Language

Unless the circumstances indicate otherwise, all implied warranties (merchantability, fitness for particular purpose) are excluded by language which in common understanding calls the buyer's attention to the exclusion of warranties and makes it plain that there is no implied warranty. § 2-316(3)(a). Example: "The goods sold under this agreement are sold 'as is' and 'with all faults."

Other language may be used to exclude or modify implied warranties:

- (a) To exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability and in the case of a writing must be conspicuous. § 2-316(2). A term or clause is inconspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. § 1-201(10). Example of conspicuous merchantability disclaimer: "SELLER MAKES NO WARRANTY OF MERCHANTABILITY WITH RESPECT TO GOODS SOLD UNDER THIS AGREEMENT."
- (b) To exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous, §§ 2-316(2), 1-201(10). Example: "THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE HEREOF."

Standard Commercial Practices for Limitation of Remedies for Breach of Warranty

Viewgraph O-6

 Standard Commercial Practices for Limitation of Remedies for Breach of Warranty

Though seller may not have excluded or modified his warranties, he may seek in the sale agreement to limit or modify the *remedies* available to the buyer for his breach of warranty. Generally, a sales agreement may provide for remedies in addition to or in substitute for those provided in UCC Article 2 and may limit or alter the measure of damages recoverable. §§ 2-316(4), 2-719(1)(a).

Example: "It is expressly understood and agreed that the buyer's sole and exclusive remedy shall be repair or replacement of defective parts, and that the seller shall not be liable for damages for injuries to persons or property."

Limitation of remedies for breach of warranty

Viewgraph O-7

7. Limitation of remedies for breach of warranty

Though seller may not have excluded or modified his warranties, he may seek in the sale agreement to limit or modify the *remedies* available to the buyer for his breach of warranty. Generally, a sales agreement may provide for remedies in addition to or in substitute for those provided in UCC Article 2 and may limit or alter the measure of damages recoverable. §§ 2-316(4), 2-719(1)(a).

Example: "It is expressly understood and agreed that the buyer's sole and exclusive remedy shall be repair or replacement of defective parts, and that the seller shall not be liable for damages for injuries to persons or property."

Remedies where buyer has finally accepted the goods

Viewgraph O-8

8. Remedies where buyer has finally accepted the goods

UCC § 2-714 deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone buy. §§ 2-714, 2-606, 2-607, 2-608. In this situation, the damages are measured thus: Where buyer has accepted goods, buyer may recover as damages for any nonconformity of tender (e.g., goods do not conform to seller's warranties), the loss resulting in the ordinary course of events from seller's breach as determined in any manner which is reasonable. § 2-714(1). Of course, buyer must within a reasonable time after buyer discovers or should have discovered any breach notify seller of breach or be barred from any remedy. §§ 2-714(1), 2-607(3)(a).

The usual, standard and reasonable method of ascertaining damages in the case of breach of warranty, but not intended as an exclusive measure, is as follows: The measure of damages for breach of warranty is the difference (at the time and place of acceptance) between the value of the goods accepted and the value they would have had if they had been as warranted. § 2-714(2).

Example: Seller and buyer enter into a contract for sale of carpeting for \$14 per square yard. Lines appeared in the carpeting constituting a breach of warranty per §§ 2-313, 2-314, 2-315. The salvage value of the scrap was \$4 per square yard. Buyer's damages were \$10 per square yard, the difference between the value of the goods accepted (\$4 per square yard) and the value they would have had if they had been as warranted (\$14 per square yard purchase price is probably good evidence of the value of the goods if they had been as warranted). Buyer, on notifying seller of his intention to do so. may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

SECTION P Section P: Termination

Informal Lecture and Viewgraphs

(60 minutes)

Learning Objective: Understanding the basic issues and steps in terminating a contract for commercial items under FAR Part 12.

TERMINATING CONTRACTS UNDER PART 12

- Government's right to terminate both for cause and convenience.
- Use Part 49 as guidance ONLY.
- Follow the language of the termination paragraphs in 52.212-4.

Viewgraph P-1

- 1. Terminating Contracts under Part 12
 - The government reserves the right to terminate both for cause and convenience (*NEW*)
 - Contracting officers may continue to use Part 49 as guidance ONLY to the extent that Part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4.

12.403 Termination.

(a) General. The clause at 52.212-4 permits the Government to terminate a contract for commercial items either for the convenience of the Government or for cause. However, the paragraphs in 52.212-4 entitled "Termination for the Government's Convenience" and "Termination for Cause," contain concepts which differ from those contained in the termination clauses prescribed in Part 49. Consequently, the requirements of Part 49 do not apply when terminating contracts for commercial items and contracting officers shall follow the procedures in this section. Contracting officers may continue to use Part 49 as guidance to the extent that Part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4.

- (b) Policy. The contracting officer should exercise the Government right to terminate a contract for commercial items either for convenience or for cause only when such a termination would be in the best interest's of the Government. The contracting officer should consult with counsel prior to terminating for cause.
- (c) Termination for Cause. (1) The paragraph in 52.212-4 entitled "Excusable Delay" requires contractors notify the contracting officer as soon as possible after commencement of any excusable delay. In most situations, this requirement should eliminate the need for a show cause letter prior to terminating a contract. The contracting officer shall send a cure notice prior to terminating a contract for a reason other than late delivery.
 - (2) The Government's rights after a termination for cause shall include all the remedies available to any buyer in the marketplace. The Government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess reprocurement costs together with any incidental or consequential damages incurred because of the termination.
 - (3) When a termination for cause is appropriate, the contracting officer shall send the contractor a written notification regarding the termination. At a minimum, this notification shall
 - (i) Indicate the contract is terminated for cause;
 - (ii) Specify the reasons for the termination;
 - (iii) Indicate which remedies the Government intends to seek or provide a date by which the Government will inform the contractor of the remedy; and
 - (iv) State that the notice constitutes a final decision of the contracting officer and that the contractor has the right to appeal under the Disputes clause.
- (d) Termination for the Government's Convenience.
- (1) When the contracting officer terminates a contract for commercial items for the Government's convenience, the contractor shall be paid:
 - (i) The percentage of the contract price reflecting the

- percentage of the work performed prior to the notice of the termination, and
- (ii) Any charges the contractor can demonstrate directly resulted from the termination. The contractor may demonstrate such charges using its standard record keeping system and is not required to comply with the cost accounting standards or the contract cost principles in Part 31. The Government does not have any right to audit the contractor's records solely because of the termination for convenience.
- (2) Generally, the parties should mutually agree upon the requirements of the termination proposal. The parties must balance the Government's need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement.

EXCUSABLE DELAY

- Beyond control of the Contractor.
- Without contractor's fault or negligence
- Contractor must notify CO.
- Requirement to remedy with dispatch:
 - a. Requirement to notify CO of cessation.
 - b. CO ascertain facts.
 - c. CO modifies delivery schedule.

Viewgraph P-2

1. Excusable Delay

52.212-4(f) Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, Acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is

reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

Issues and steps in determining what is an excusable delay

- a. Occurrences beyond the reasonable control of the Contractor
- b. Without contractor fault or negligence
- c. Contractor requirement to notify the Contracting Officer as soon as it is reasonably possible after the commencement of any excusable delay
- d. Contractor requirement to remedy such occurrence with all reasonable dispatch
- e. <u>Contractor requirement to promptly notify to the Contracting Officer of the cessation of excusable delay</u>
- f. Contracting officer to ascertain the facts and extent of the failure
- g. Issue modification to delivery schedule.
- 3. Customary Commercial Practice Excuse of Performance

UCC contains three sections which state general principles relieving the seller from full performance of his contractual obligations — excuse, impossibility, impracticability, or even implied promise or condition.

a) UCC § 2-615 **excuses** a seller from timely delivery of goods when unforeseen, supervening circumstances occur which had not been contemplated by the parties at the time of contracting. The Code states that except so far as a seller may have assumed a greater obligation, delay in delivery or non-delivery by a seller is not a breach of seller's duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency, the *non-concurrence* of which was a basic assumption on which the contract was made. Seller must notify buyer seasonably that there will be a delay or non-delivery.

Application of the above rule requires the following observations: Increased cost alone does not excuse per-

formance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. A rise or a collapse in the market is not, in itself, a justification. That is *exactly* the type of *business risk* which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to contingencies such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to seller's performance *is within* the contemplation of § 2-615.

- b) Causality to Identified Goods. Where the contract requires for its performance goods identified when the contract is made, and the goods suffer causality without fault of either party before the risk of loss passes to the buyer, if the loss is total, the contract is voided. UCC § 2-613(a). Example: Farmer contracts to sell crops growing on designated land. Bad climatic conditions cause a failure of the specific crop. Assuming the risk of loss does not pass to buyer until the crop is duly delivered to a carrier for shipment, farmer's performance is excused.
- c) **Substitute Performance.** Where without fault of either party the agreed manner of delivery becomes commercially impracticable (e.g., (1) the agreed berthing, loading, or unloading facilities fail, or (2) an agreed type of carrier becomes unavailable) but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted. § 2-614(1).

TERMINATIONS FOR CAUSE UNDER PART 12

- Any default by the contractor, or
- Any failure to comply with contract terms and conditions, or
- Failure to provide adequate assurances of future performance.
- Any and all rights and remedies provided by

- 4. Terminations for Cause under Part 12 (New)
 - Government may terminate for cause under FAR 52.212-4:
 - 1. In the event of any default by the contractor, or
 - 2. If the contractor fails to comply with any contract terms and conditions, or
 - 3. If the contractor fails to provide the Government, upon request, with adequate assurances of future performance.
 - 4. Any and all rights and remedies provided by law.

(Note: These are basically the same three causes in FAR Part 49 default clauses.)

52.212-4(m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience

Procedure to Terminate for Cause

- Cure notices required prior to terminating for reasons other than late delivery.
- Show-cause notices not required.
- Terminate for cause by written notice to the contractor.

Viewgraph P-5

5. **Procedure to Terminate for Cause**

- a. Cure notices are still required prior to terminating a contractor for a reason other than late delivery.
- b. Show-cause notices are not required but are permitted.

- c. Contracting officers must terminate for cause by sending a written notice to the contractor.
- d. Notification shall—
 - (1) Indicate the contract is terminated for cause,
 - (2) Specify the reasons for the termination,
 - (3) Indicate which remedies the Government intends to seek or provide a date by which the Government will inform the contractor of the remedy, and
 - (4) State that the notice constitutes a final decision of the contracting officer and that the contractor has the right to appeal under the Disputes clause.

CONTRACTOR LIABILITY

If a contract is terminated for cause, the Contractor is liable to the Government for any and all rights and remedies provided by law.

Viewgraph P-6

6. Rights and remedies provided by Law

- a. If a contract is terminated for cause, the contractor is liable to the Government for any and all rights and remedies provided by law.
- b. FAR 12.403 further stipulates that the Government's rights after a termination for cause shall include all the remedies available to any buyer in the marketplace" and that the "preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess reprocurement costs together with any incidental or consequential damages incurred because of the termination."
- c. In commercial law, this remedy is known as "cover" (UCC §2-712).

Other buyer's rights and remedies.

- a. Cancel and, with notice, rescind contract (UCC §2-711).
- b. Sue for breach of contract (UCC §2-713) if the seller repudiates the contract or fails to deliver (in which case the measure of recovery is the difference between the contract price and the market price of the goods at the time that the buyer learned of the breach). In this case, there is no reprocurement the buyer does without the deliverable.
- c. Exercise the right of replevin (UCC §2-7163(3)) if the seller has the deliverable but refuses to make delivery (and the buyer cannot reprocure from another source).
- d. Sue for specific performance (UCC §2-715(1)) if the seller refuses to perform and the buyer cannot reprocure the deliverable from any other source.

TERMINATIONS FOR CONVENIENCE Part 12 differs from Part 49

Viewgraph P-7

7. Terminations for Convenience under Part 12 (New)

- a. The government has the right to fully or partially terminate for its sole convenience.
- b. Avoid at all costs because it will cost.
- c. Contractor requirement to stop work causes its suppliers and subcontractors to stop work.
- d. FAR 52.212-4 establishes a new basis for convenience termination settlements.
- e. Do not pay the contractor for any work performed or costs incurred "which reasonably could have been avoided".
- f. Contractor is not required to comply with the cost accounting standards nor with any contract cost principle
- g. Government does not have a right to audit contractor's records.

52.212-4(1) Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

PROCUEDURES FOR TERMINATIONS FOR CONVENIENCE

- Provide written notice specifying extent of termination and effective date.
- Determine termination charge.
- Determine reasonable settlement costs.

Viewgraph P-8

8. Procedures for Terminations for Convenience

- a. Provide written notice to contractor specifying the extent of termination (total or partial) and the effective date.
- b. Determine termination charge based on percentage of work performed.
- c. Determine reasonable costs of settlement.
- d. Settle all outstanding liabilities and termination settlement proposals.

9. Customary Commercial Practices.

- a. FAR Part 12 clause was taken directly from a commercial agreement.
- b. Not a standard but the clause appears in many commercial contracts.
- c. Parties must specifically include a convenience termination provision.
- d. Provision allows contractor to submit a settlement proposal.

10. Termination Settlements

Percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination will be presented through a classroom exercise calculating amounts due to a contractor

FAR 52.212-4:

- a. Percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, PLUS
- b. Reasonable charges that the contractor can demonstrate—to the satisfaction of the government using its standard record keeping system—have resulted from the termination.

11. Reasonable termination charges

- a. Contractor demonstration of charges using its standard record keeping system.
- b. Identifying work performed or costs incurred which reasonably could have been avoided.

12. No CAS, No Cost Principles, No Audit

Contractor is not required to comply with the cost accounting standards or contract cost principles to demonstrate termination charges. The Government also doesn't have the right to audit the contractor's records.

13. Comptroller General Audit Rights

a. Applicability – contracts in excess of the simplified acquisition threshold awarded using other than sealed bidding (and which do not contain 52.215-2, Audit and Records – Negotiation).

- b. The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Contractor's directly pertinent records involving transactions related to the contract until three years after final payment or after any final termination settlement.
- c. Records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

OTHER COMMERCIAL REMEDY PRINCIPLES

Damages for breach by either party may be liquidated in the agreement

Viewgraph P13

14. Other commercial remedy principles applicable to sellers and buyers

Liquidated Damages

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of: (1) the anticipated or actual harm caused by the breach, (2) the difficulties of proof of loss, and (3) the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy (UCC§ 2-718(1)). Example of liquidated damage clause intended to be reasonable in light of these three factors:

"Inasmuch as the failure of the seller to deliver the quantity of commodities specified herein, in accordance with the terms and conditions of this agreement will, because of the urgent need for the commodities by the buyer, arising from the present emergency conditions, cause serious and substantial damages to the buyer, and it will be difficult, if not impossible to prove the amount of such damages, the seller agrees to pay to the buyer, [amount] as liquidated damages for failure to deliver, which sum is computed as follows:

[number] cents per pound for [identify or designate article]; [number] cents per pound for [identify or designate article]; [etc.]

The sum is agreed upon as liquidated damages and not as a penalty. The parties hereto have computed, estimated, and agreed upon the sum as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damage which will result."

SECTION Q

KEY POINTS TO REMEMBER

- Broad definition of commercial items
- Critical importance of market research
- Performance oriented requirements documents
- Part 12 is mandatory for commercial items
- Relationship of Part 12 to Parts 13, 14 & 15
- Statutory clause limitation
- Buyers & sellers terms
- Tailoring standard terms

Viewgraph Q-1